DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-62
Title: Marvin Peugh, Petitioner
v.
United States
Docketed: July 17, 2012
Linked with 11A1188
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (10-2184)
Decision Date: March 28, 2012
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jun 13 2012	Application (11A1188) to extend the time to file a petition for a writ of certiorari from June 26, 2012 to August 10, 2012, submitted to Justice Kagan.
Jun 13 2012	Application (11A1188) granted by Justice Kagan extending the time to file until August 10, 2012.
Jul 16 2012	Petition for a writ of certiorari filed. (Response due August 16, 2012)
Aug 7 2012	Order extending time to file response to petition to and including September 17, 2012.
Aug 16 2012	Brief amicus curiae of Illinois Association of Criminal Defense Lawyers filed.
Sep 10 2012	Order further extending time to file response to petition to and including October 12, 2012.
Oct 12 2012	Brief of respondent United States in opposition filed.
Oct 23 2012	Reply of petitioner Marvin Peugh filed.
Oct 24 2012	DISTRIBUTED for Conference of November 9, 2012.
Nov 9 2012	Petition GRANTED.
Dec 18 2012	SET FOR ARGUMENT ON Tuesday, February 26, 2013
Dec 26 2012	Joint appendix filed. (Statement of costs filed)
Dec 26 2012	Brief of petitioner Marvin Peugh filed.
Dec 26 2012	Motion to file Volume II of the joint appendix under seal filed by petitioner Marvin Peugh.
Jan 2 2013	Brief amicus curiae of Illinois Association of Criminal Defense Lawyers filed. (Distributed)
Jan 3 2013	Record from U.S.C.A. for 7th Circuit is electronic.
Jan 9 2013	Motion DISTRIBUTED for Conference of February 15, 2013.
Jan 10 2013	CIRCULATED.
Jan 25 2013	Brief of respondent United States filed. (Distributed)
Feb 19 2013	Motion to file Volume II of the joint appendix under seal GRANTED.
Feb 19 2013	Reply of petitioner Marvin Peugh filed. (Distributed)

Feb 26 2013 Argued. For petitioner: Stephen B. Kinnaird, Washington, D. C. For respondent: Eric J. Feigin, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

No. 12-62

Supreme Court, U.S.
FILED
JUL 16 2012
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

MARVIN PEUGH, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The U.S. Sentencing Guidelines Manual directs a court to "use the Guidelines Manual in effect on the date that the defendant is sentenced" unless "the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the Ex Post Facto Clause of the United States Constitution." Eight courts of appeals have held that the Ex Post Facto Clause is violated where retroactive application of the Sentencing Guidelines creates a significant risk of a higher sentence. In the decision below, however, the Seventh Circuit has held that the Ex Post Facto Clause is never violated by retroactive application of the Sentencing Guidelines because the Guidelines are advisory, not mandatory.

The question presented is:

> Does a sentencing court violate the Ex Post Facto Clause by using the U.S. Sentencing Guidelines in effect at the time of sentencing rather than the Guidelines in effect at the time of the offense, if the newer Guidelines create a significant risk that the defendant will receive a longer sentence?

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PETITION FOR A WRIT OF CERTIORARI

Marvin Peugh respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS AND ORDERS BELOW

The judgment of the United States District Court for the Northern District of Illinois is unreported but reprinted at App. 14a-25a, and the oral ruling of the district court is reproduced at App. 28a. The Seventh Circuit's opinion and order, affirming the judgment of the district court, is reported at 675 F.3d 736 and reprinted at App. 1a-13a.

JURISDICTION

The Seventh Circuit entered its opinion and order and its judgment on March 28, 2012. On June 13, 2012, Justice Kagan granted application 11A1188, extending the time within which to file a petition for a writ of certiorari to and including August 10, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Ex Post Facto Clause of the U.S. Constitution provides, "No . . . *ex post facto* Law shall be passed." U.S. Const. art. I, § 9, cl. 3. The relevant provisions of the 1998 U.S. SENTENCING GUIDELINES MANUAL (§§ 2F1.1, 3C1.1, and 5A) and the 2009 U.S. SENTENCING GUIDELINES MANUAL (§§ 1B1.11, 2B1.1, 3C1.1, 5A, and Appendix C, Vol. II, Amendments 617 and 653) are reproduced in appendices D-G to this petition at App. 44a-68a.

STATEMENT OF THE CASE

This case presents an important and recurring constitutional issue on which the federal courts of appeals are intractably divided: whether, in the wake of *United States v. Booker*, 543 U.S. 220 (2005), the retroactive application of the Sentencing Guidelines violates the Ex Post Facto Clause when the newer Guidelines create a significant risk of a harsher sentence than would have been imposed under Guidelines in effect at the time of the crime. The Solicitor General has previously declared that the "courts of appeals are divided" 5-1 on the question. The D.C., Second, Fourth, Sixth and Eleventh Circuits find an *ex post facto* violation in such circumstances. By contrast, only one circuit—the Seventh Circuit, the court below—has held to the contrary that the Ex Post Facto Clause is not implicated because the Guidelines are advisory. Brief for the United States at 8, 10-11, *Sandoval v. United States*, No. 11-9492 (S. Ct. May 2012) ("*Sandoval* BIO"); *accord* Brief for the United States at 16-17, *Gabayzadeh v. United States*, No. 11-1034 (S. Ct. May 2012) ("*Gabayzadeh* BIO"). The circuit split is acknowledged and entrenched. The courts of appeals in the majority have explicitly rejected the Seventh Circuit's analysis, and the Seventh Circuit (despite acknowledging its position as the minority rule) has repeatedly refused to reconsider its precedent. Indeed, the circuit split is broader than the Government suggests, with three other courts of appeals applying *ex post facto* analysis to advisory guidelines after *Booker*.

Resolving the circuit conflict is critical to maintaining the goal of uniform federal sentencing,

and the Solicitor General has acknowledged that this "circuit conflict may warrant this Court's review in an appropriate case." *Sandoval* BIO at 10-11; *Gabayzadeh* BIO at 16-17. This is such a case. Unlike prior cases that have come before this Court, this case is free of defects that would make it an unsuitable vehicle for resolving the question presented. Mr. Peugh raised the issue in both the district court and the court of appeals, and both courts squarely addressed it. The Seventh Circuit's rule materially lengthened his sentence: Mr. Peugh's 70-month sentence, which was at the *bottom* of the range calculated under the 2009 Guidelines in effect at the time of his sentence, was 24 months above the *top* of the range calculated under the 1998 Guidelines in effect at the time of his offense. Finally, given the length of Mr. Peugh's sentence, there is no risk that this case will become moot during the pendency of this Court's review. This Court should grant review and resolve this important constitutional issue that affects large numbers of sentences in the federal courts.

A. Legal Background

The Sentencing Reform Act of 1984, as amended, directs sentencing courts to consider a number of factors in imposing a sentence, including Guidelines issued by the Sentencing Commission. 18 U.S.C. § 3553(a)(4)(A) (2006). The statute directs a court to consider the Guidelines "in effect on the date the defendant is sentenced." *Id.* § 3553(a)(4)(A)(ii). The Guidelines implement that statute with the proviso that "[i]f the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the Ex Post

Facto Clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b) (2011).

B. Facts and Proceedings Below

In 2010, a jury convicted Mr. Peugh of five counts of bank fraud under 18 U.S.C. § 1344 related to loans received for farming businesses Mr. Peugh ran with his cousin (one count pertaining to allegedly fraudulent loan activity and four counts pertaining to an alleged check-kiting scheme).[1] App. 3a, 5a. Mr. Peugh is currently serving a 70-month prison term for these offenses. *See id.* 6a. He and his cousin, Steven Hollewell, were accused of engaging in a loan fraud and check kiting scheme lasting from January 1999 to August 2000. *Id.* 2a. Mr. Peugh's cousin received a 12-month sentence as a result of a negotiated plea of guilty to one count, and the other counts were dropped in exchange for Mr. Hollewell's testifying for the United States. *Id.* 6a.

At sentencing, Mr. Peugh challenged the court's use of the 2009 Guidelines rather than the 1998 Guidelines in effect at the time of his offenses,[2] asserting that using the newer Guidelines violated

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[1] Mr. Peugh was acquitted on bank fraud counts 1 and 2, convicted of bank fraud count 3, acquitted on check-kiting counts 6 and 7, and convicted of check-kiting counts 4, 5, 8 and 9. App. 3a, 5a.

[2] The court of appeals referred throughout the opinion to the "1999 Guidelines" (*see, e.g.*, App. 5a, 8a), but the Guidelines in effect in 1999 at the time of the offenses were actually published in November 1, 1998, and thus are referred to in this petition as the "1998 Guidelines."

the Ex Post Facto Clause because they resulted in a longer sentence not authorized at the time of the offense. *Id.* 5a, 28a; *see also* Defendant's Objections to Presentence Investigation Report 1–2, *United States v. Peugh*, No. 08-CR-50014 (N.D. Ill. Apr. 2, 2010). The district court, relying on *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006), rejected Peugh's argument on the ground that the Guidelines are not mandatory, but merely advisory. App. 28a ("The court is bound by the holding in *Demaree*, and, accordingly, the court overrules the defendant's objection to use of the 2009 guidelines manual.").

Application of the 2009 Guidelines rather than the 1998 Guidelines significantly increased the Guidelines sentencing range. The presentencing report calculated the offense level under the 1998 Guidelines as 19, but the Government argued in the court of appeals that, if the 1998 Guidelines applied, there should be an additional two-level enhancement for obstruction of justice, bringing the total offense level to 21. Brief for the United States, Plaintiff-Appellee, at 11, *United States v. Peugh*, No. 10-2184 (7th Cir. July 5, 2011); *see also* U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (Nov. 1, 1998) (App. 44a-46a) (for fraud offenses, including bank fraud, the base offense level is 6, and 13 levels are added for losses over $2.5 million); *id.* § 3C1.1 (two-level enhancement for obstruction of justice) (App. 47a). Under the 1998 Guidelines, a total offense level of 21 would result in a sentencing range of 37 to 46 months. *Id.* § 5A (App. 48a). By contrast, the district court calculated a total offense level of 27 under the 2009 Guidelines: a base offense level of 7 (per Amendment 653, to the Sentencing Guidelines, effective November 1, 2003, App. 68a), and

enhancements of 18 levels for losses of at least $2.5 million (per Amendment 617, to the Sentencing Guidelines, effective November 1, 2001, App. 64a-67a), plus 2 levels for obstruction of justice. Sentencing Transcript, *United States v. Peugh*, No. 08 CR 50014, Vol. 2, at 42 (N.D. Ill. May 4, 2010) App. 37a; *see* U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1(a)(1), 2B1.1(b)(1)(j), 3C1.1 (Nov. 1, 2009)[3] (App. 52a-59a). The 2009 Guideline range for a total offense level of 27 was 70-87 months. U.S. SENTENCING GUIDELINES MANUAL § 5A (Nov. 1, 2009) (App. 62a). The district court chose to impose the lowest sentence within the 2009 Guidelines range (70 months) on Mr. Peugh. App. 2a; App. 17a; App. 40a-41a. The district court expressed no opinion on the sentence it would have imposed had it applied the 1998 Guidelines instead.

On appeal, Mr. Peugh again argued that his sentencing violated the Ex Post Facto Clause, because the 2009 Guidelines called for a sentence 33 to 41 months longer than called for under the 1998 Guidelines. App. 5a, 8a-9a. Retroactive application of the 2009 Guidelines undeniably resulted in a harsher sentence: Mr. Peugh's 70-month sentence was at the very bottom of the 2009 Guidelines range, but was 24 months longer than even the top of the 1998 Guidelines range. *See* Brief of Marvin Peugh, Defendant-Appellant at 30, *United States v. Peugh*,

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[3] Amendment 617 deleted the fraud-and-deceit guideline of 2F1.1 and consolidated it with the general economic-crimes guideline of 2B1.1. App. 64a-67a.

No. 10-2184 (7th Cir. April 21, 2011)[4]; *compare* App. 47a-51a and App. 59a-63a. The court of appeals, like the district court, relied on *Demaree* in rejecting Peugh's argument. App. 8a.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ON THE QUESTION PRESENTED

The Ex Post Facto Clause "bar[s] enactments which, by retroactive operation, increase the punishment for a crime after its commission." *Garner v. Jones*, 529 U.S. 244, 249 (2000). "[C]entral to the *ex post facto* prohibition is a concern for 'the lack of fair notice and governmental restraint'" when punishment is increased after the fact. *Miller v. Florida*, 482 U.S. 423, 430 (1987) (quoting *Weaver v. Graham*, 450 U.S. 24, 30 (1981)). Even where the increase in punishment may depend on the exercise of discretion, the Ex Post Facto Clause is violated if the later enactment applied to the defendant's sentence "created a significant risk of increasing his punishment." *Garner*, 529 U.S. at 255.

The U.S. Sentencing Guidelines require that a sentencing court "use the Guidelines Manual in effect on the date that the defendant is sentenced," but "[i]f the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the Ex Post Facto Clause of

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[4] The Seventh Circuit observed that as a result of application of the 2009 Guidelines, "Peugh's advisory range jumped by more than 20 months," App. 8a (*Peugh*, 675 F.3d at 741), but more precisely it increased the upper limit of the range by 41 months, resulting in a sentence 24 months above the top of the 1998 range.

the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." U.S. SENTENCING GUIDELINES MANUAL § 1B1.11 (2009) (App. 52a). In 2005, this Court held that "the federal sentencing statute ... makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, ..., but it permits the court to tailor the sentence in light of other statutory concerns as well." *Booker*, 543 U.S. at 245–46 (Breyer, J., remedial majority opinion) (citations omitted).

In the wake of *Booker*, an entrenched and acknowledged split has arisen among the federal courts of appeals on whether retroactive application of Sentencing Guidelines adopted after the commission of the offense can violate the Ex Post Facto Clause. *See, e.g.*, *United States v. Ortiz*, 621 F.3d 82, 86 (2d Cir. 2010) (application of Ex Post Facto Clause to sentencing "has divided the courts of appeals"), *cert. denied*, 131 S. Ct. 1813 (2011); *United States v. Wetherald*, 636 F.3d 1315, 1320 (11th Cir. 2010) ("Our sister circuits have split on the impact of Booker in regards to the Ex Post Facto Clause."). In *Demaree*, the Seventh Circuit held categorically that the Ex Post Facto Clause no longer applies to retroactive application of the Sentencing Guidelines, because the Ex Post Facto Clause "appl[ies] only to laws and regulations that bind rather than advise." 459 F.3d at 795.

As the Solicitor General has stated in other cases, five other courts of appeals (the D.C., Second, Fourth, Sixth, and Eleventh Circuits) have expressly "disagreed [with *Demaree*] and concluded that the

Guidelines may implicate the Ex Post Facto Clause even though they are advisory." *Sandoval* BIO at 11. Rejecting "the facial analysis applied in *Demaree*" and relying on *Garner*, the D.C. Circuit held that "the existence of discretion does not foreclose an *ex post facto* claim, as Demaree supposed." *United States v. Turner*, 548 F.3d 1094, 1100 (D.C. Cir. 2008). Rather, the proper test is whether, as applied to the defendant's sentence, retroactive application of the Sentencing Guidelines creates a significant risk of increased incarceration. *Id.* at 1098–1100 (citing *Garner*, 529 U.S. at 251, and *Miller*, 482 U.S. at 432, 433, 435). The court reasoned that "practically speaking, applicable Sentencing Guidelines provide a starting point or 'anchor' for judges and are likely to influence the sentences judges impose." *Id.* at 1099. Judges are also more likely to impose sentences within the Guidelines range because such sentences are entitled to a presumption of reasonableness on appeal. *Id.* (citing *Rita v. United States*, 551 U.S. 338 (2007)). The Second, Fourth, Sixth, and Eleventh Circuits have explicitly adopted the reasoning of *Taylor* and rejected that of *Demaree*. *See Ortiz*, 621 F.3d at 86–88; *United States v. Lewis*, 606 F.3d 193, 199 (4th Cir. 2010); *United States v. Lanham*, 617 F.3d 873, 889–90 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 2443 (2011); *Wetherald*, 636 F.3d at 1322.

The disagreement in the circuits is wider than the Government has acknowledged. In *United States v. Wood*, 486 F.3d 781, 789–91 (3d Cir. 2007), the Third Circuit, although not discussing *Booker*, vacated and remanded a sentence because application of a post-offense amendment of the Sentencing Guidelines would violate the Ex Post Facto Clause. And in *United States v. Forrester*, 616 F.3d 929, 946 (9th Cir.

2010), the Ninth Circuit remanded for resentencing because the Ex Post Facto Clause prevented application of Guidelines amended after the end date of the conspiracy that "would impose a harsher punishment than would the version in effect when the offense was committed, [and thus] the court 'shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.'" *Id.* at 946–48 (quoting U.S. SENTENCING GUIDELINES MANUAL §1B1.11, App. 52a); *see also United States v. Reasor*, 418 F.3d 466, 479 & n.12 (5th Cir. 2005) (holding post-*Booker* that on remand the district court should apply the earlier rather than the later advisory guidelines to avoid *ex post facto* violations). Two other circuits have embraced the majority rule in dicta. *See United States v. Carter*, 490 F.3d 641, 643 (8th Cir. 2007) (noting that the "retrospective application of the Guidelines implicates the ex post facto clause" and rejecting the *Demaree* rule, but finding that the defendant had forfeited the issue) (internal quotation marks omitted); *United States v. Thompson*, 518 F.3d 832, 869–70 (10th Cir. 2008) (acknowledging under plain-error review that the Ex Post Facto Clause was implicated when offender was disadvantaged by application of Guidelines adopted after the offense, but holding that the Guidelines applied by the district court did not post-date the offense). Finally, the First Circuit (while avoiding the constitutional issue) applies a rule in conflict with the Seventh Circuit's. It follows a "commonsense protocol," under which courts "'ordinarily employ the [G]uidelines in effect at sentencing only where they are as lenient as those in effect at the time of the offense; when the [G]uidelines have been made more severe in the interim, the version in effect at the time

of the crime is normally used . . . .'" *United States v. Ricardo-Rodriguez*, 630 F.3d 39, 42 (1st Cir. 2011) (quoting *United States v. Maldonado*, 242 F.3d 1, 5 (1st Cir. 2001)).

Despite acknowledging the circuit split and its isolation as the minority-rule circuit, the Seventh Circuit has consistently rejected entreaties to reconsider *Demaree*. That court denied petitions for panel rehearing and rehearing en banc in *Demaree* itself. 459 F.3d at 792. In the decision below, the court stated: "We . . . stand by *Demaree's* reasoning—the advisory nature of the guidelines vitiates any *ex post facto* problem—and again decline the invitation to overrule it." App. 8a; *see also United States v. Wasson*, 679 F.3d 938, 951 (7th Cir. 2012) (declaring that "[a]lthough [the defendant] urges us to reconsider our holding and reminds us that ours is a minority view among the circuits, he offers nothing new to convince us that we should change course on this issue now") (internal citations omitted); *United States v. Sandoval*, 668 F.3d 865, 870 (7th Cir. 2011) (noting that the court has "consistently upheld" *Demaree*), *cert. denied*, 132 S. Ct. 1987 (2012); *United States v. Robertson*, 662 F.3d 871, 876 (7th Cir. 2011) (refusing to overrule *Demaree*); *United States v. Favara*, 615 F.3d 824, 829 (7th Cir. 2010) (*Demaree* forecloses challenge to sentence based on Ex Post Facto Clause), *cert. denied*, 131 S. Ct. 1812 (2011). Accordingly, there is an entrenched split of authority on this important constitutional question regarding application of the Ex Post Facto Clause, which only this Court can resolve.

II. THE SEVENTH CIRCUIT'S DECISION IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND DISREGARDS THE SIGNIFICANT RISK THAT APPLYING HARSHER GUIDELINES WILL RESULT IN A LONGER SENTENCE.

Review is also warranted because the categorical *Demaree* rule adopted by the Seventh Circuit is irreconcilable with this Court's precedent. Under the Ex Post Facto Clause, an enactment that affords discretion in determining criminal punishment cannot be constitutionally applied if it "create[s] a significant risk of increased punishment." *Garner*, 529 U.S. at 255. Here, the 2009 Guidelines, even though advisory, created just such a significant risk that Peugh would suffer increased punishment. The sentencing range calculated under the 2009 Guidelines (70-87 months) was nearly twice that calculated under the 1998 Guidelines (37-46 months) and influenced the sentence that the district court imposed.

The significant risk that substantially increased Guidelines ranges will result in increased punishment derives from the very nature of the Sentencing Reform Act post-*Booker*. The Guidelines, even though advisory, are "the starting point and initial benchmark" for sentencing. *Gall v. United States*, 552 U.S. 38, 49 (2007). "The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Booker*, 543 U.S. at 264 (Breyer, J., remedial majority opinion). If a district court attempts to impose a sentence outside that range, it "must consider the extent of the deviation [of the

intended sentence from the Guideline range] and ensure that the justification *is sufficiently compelling* to support the degree of the variance." *Gall*, 552 U.S. at 50 (emphasis added). Accordingly, even the advisory Sentencing Guidelines "serve[ ] to cabin the potential sentence that may be imposed," *Wetherald*, 636 F.3d at 1321, and thus "are likely to influence the sentences judges impose," *Turner*, 548 F.3d at 1099; *accord Lewis*, 606 F.3d at 199-203.

Moreover, the Guidelines provide a framework that influences prosecutors' and defendants' plea bargains. *See, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2533 (2004) (discussing the Guidelines as mental anchors that frame plea bargaining "by establishing clear baselines for likely sentences after trial"). The retroactive application of harsher Guidelines affects not only the decision to plead guilty, but also the offenses and conduct that the defendant will admit and the sentence recommended by the prosecutor. Application of the 1998 Guidelines may have affected the Government's strategy with regard to plea offers, as well as Mr. Peugh's decision to plead not guilty to all counts (nearly half of which eventually resulted in acquittals) even in the face of his co-defendant Mr. Hollewell's decision to plead guilty to one count and escape prosecution on the remaining counts. Harsher Guidelines inexorably increase the risk that courts will impose greater sentences of imprisonment than they would have imposed under more lenient Guidelines.

Finally, in *Rita*, this Court determined that "a court of appeals may apply a presumption of reasonableness to a district court sentence that

reflects proper application of the Sentencing Guidelines." *Rita*, 551 U.S. at 347. This presumption provides a clear incentive to sentencing within the Guidelines range: "judges are more likely to sentence within the Guidelines to avoid the increased scrutiny that is likely to result from imposing a sentence that is outside the Guidelines." *Turner*, 548 F.3d at 1099. Not only is a district court more likely to sentence in the Guideline range, but such sentences are more likely to be upheld on appeal.

> [O]nce a sentencing judge correctly applies the Guidelines range, the defendant's relief is limited. [A court of appeals] will disturb the sentence if, but only if, [it] is left with the definite but firm conviction that the district committed a clear error in judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.

Wetherald, 636 F.3d at 1322 (internal quotation marks omitted). Indeed, *Booker*, having excised the constitutionally offensive provisions of the statute, sought to ensure that sentencing under advisory Guidelines would approximate sentencing under the mandatory Guidelines system that Congress initially devised. The critical "features" of the post-*Booker* statute—district court consultation of the Guidelines and appellate review of sentences for substantive unreasonableness—"continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where

necessary." *Booker*, 543 U.S. at 264-65 (Breyer, J., remedial majority opinion).

For all these reasons, and others, the statistical evidence has consistently revealed not much change in sentencing practices post-*Booker*. *Turner*, 548 F.3d at 1099. The vast majority of sentences imposed by federal courts each year fall within the Guidelines range. For example, excluding cases where the government itself sought a departure or variance, 3 out of 4 times a court sentenced a federal offender within the Guidelines range in fiscal year 2011; only 1 in 4 times did a court impose a sentence below the Guidelines range. U.S. SENTENCING COMMISSION, 2011 ANNUAL REPORT 35-37 (2011). In most cases, therefore, the Guidelines exert significant influence over sentencing decisions and form the initial basis for all sentencing.

There can be little doubt that application of the 2009 Guidelines created a significant risk that Mr. Peugh suffered a longer sentence than he would have received under the 1998 Guidelines. The district court's choice to sentence Mr. Peugh to 70 months' imprisonment, at the very bottom of the 2009 Guidelines range, indicated that Mr. Peugh merited the lowest punishment typically imposed for this type of offense and offender. While it is theoretically possible that the district court could have imposed the same sentence under the 1998 Guidelines, an Ex Post Facto Clause violation depends on the likely practical effect on the actual sentence. *Miller*, 482 U.S. at 432; *Turner*, 548 F.3d at 1100. Here, this Court need not speculate on the effect of the 2009 Guidelines because the district court explicitly deferred to them. While acknowledging that it was

free to apply "its own penal philosophy," the district court stated that:

> [T]he Seventh Circuit has cautioned that as a matter of prudence and in recognition of the Commission's knowledge, experience, and staff resources, an individual judge should think long and hard before substituting his personal penal philosophy for that of the Commission.
>
> Here the Court does not disagree with the policy implicit in Section 2B1.1 of imposing increasingly stricter punishments on defendants that cause increasingly larger amounts of loss. ... I am not convinced this general policy should be disregarded in this particular case.

App. 34a-35a. After rejecting Peugh's arguments for a downward variance, the district court specifically declared that it would defer to the 2009 Guidelines range:

> Here the loss amount exceeded $2.5 million, which resulted in an 18-level enhancement. However, when considering that the base offense level is only seven and considering the particular facts of this case, the court does not disagree with the policy of imposing a stricter punishment on defendants that cause significant amounts of loss. Accordingly, the court will give the *amount of loss calculations and the resulting advisory guidelines range the appropriate amount of deference in this case.*

App. 37a (emphasis added).

The same "general policy" of "imposing increasingly stricter punishments on defendants that cause increasingly larger amounts of loss" in section 2B1.1 of the 2009 Guidelines was also present in section 2F1.1 of the 1998 Guidelines; the only relevant intervening changes were the increase in the base offense levels and the increased enhancement levels for this particular amount of loss, to which the district court deferred without independent analysis. *See supra* at 4-6. The 2009 Guidelines clearly caused the district court to impose a longer sentence upon Mr. Peugh than it would have imposed under the 1998 Guidelines. Having found Mr. Peugh barely to deserve a sentence within the heartland of sentences contemplated by the 2009 Guidelines, it is highly unlikely that the district court (applying the 1998 Guidelines) would have found compelling justifications to impose a sentence that would have been 50% higher (and two years greater) than the upper limit of the Guidelines range. Application of the harsher 2009 Guidelines at a minimum created a significant risk that Mr. Peugh received a longer sentence than otherwise would have been imposed, and thus contravened the Ex Post Facto Clause.

The Seventh Circuit's categorical *Demaree* rule forecloses the as-applied analysis of significant risk required by this Court's Ex Post Facto Clause precedent. Indeed, the Seventh Circuit consciously (and impermissibly) refused to apply the significant-risk standard. The *Demaree* court acknowledged that "[t]he test for an *ex post facto* law has been variously stated by the Supreme Court" to include "whether it poses a significant risk of enhanced punishment," and such a standard would be satisfied by "even voluntary sentencing guidelines, for official guidelines even if

advisory are bound to influence judge's sentencing decisions." 459 F.3d at 794. Nonetheless, the *Demaree* court decided that the touchstone of an *ex post facto* violation should instead be the discretion of the sentencing judge. "His choice of a sentence, whether within or without the Guidelines range, is discretionary"; "the applicable guideline nudges him towards the sentencing range, but his freedom to impose a reasonable sentence outside the range is unfettered." *Id.*[5] The *Demaree* rule is thus a conscious departure from the significant-risk standard and flatly at odds with this Court's precedent. As this Court noted in *Garner*, "[t]he presence of discretion does not displace the protections of the Ex Post Facto Clause." *Garner*, 529 U.S. at 253. Rather, "[t]he controlling inquiry" is "whether retroactive application of the change in ... law created 'a sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Id.* at 250–51 (quoting *Cal. Dep't of Corrections v. Morales*, 514 U.S. 499, 509 (1995)).

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[5] *Demaree* also involved very different facts, where the district court sentenced the defendant to 30 months—squarely within the 27 to 33 month Guideline sentencing range in effect at the time of sentencing—but stated on the record that the defendant's sentence under the more lenient Guidelines in effect at the time of the offense (18 to 24 months) would have been an upward deviation to 27 months. *Id.* at 792. There is no comparable express determination in this case by the sentencing court that the defendant's sentence should have exceeded the range calculated under the more lenient Guidelines, if those were to apply. Moreover, the minimal difference between Ms. Demaree's sentence under the competing sets of Guidelines at issue—3 months—limited the impact of the court's decision regarding which Guidelines should apply. In Mr. Peugh's case, the choice of which Guidelines to apply results in a sentencing differential of 33-41 months.

This Court should grant review to resolve the circuit split and vindicate the long-standing significant-risk standard under the Ex Post Facto Clause.

III. THE QUESTION PRESENTED AFFECTS THOUSANDS OF SENTENCES.

The question presented is indisputably important. It directly influences potentially thousands of individuals sentenced by federal courts and the federal policy of sentencing uniformity. Federal courts used the Guidelines to sentence 86,201 federal offenders in fiscal year 2011, and the Seventh Circuit alone sentenced 3,064. U.S. SENTENCING COMMISSION, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 2. The Sentencing Commission continually amends the Guidelines in light of experience with federal sentencing, adopting 760 amendments to the Guidelines between 1987 and 2011, many of them substantive changes that affect the calculation of sentencing ranges. *See* U.S. SENTENCING GUIDELINES MANUAL app. C, vols. I-III (2011). Accordingly, the question will frequently recur of whether Guidelines amended after the commission of the offense may be applied consistently with the Ex Post Facto Clause.

Furthermore, timely resolution of the circuit conflict furthers the federal policy of sentencing uniformity. *Booker*, 543 U.S. at 253 (Breyer, J., remedial majority opinion) ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity."). It undermines uniformity if the district courts in the Seventh Circuit apply completely different Guidelines to a given offense than would all the federal district courts in majority-rule circuits.

Because the conflict is about the application of a constitutional provision, the U.S. Sentencing Commission cannot resolve the split but must await this Court's resolution. Moreover, the circuit conflict unfairly invites strategic prosecution by the Government. In cases where there are alternative venues, such as multi-state conspiracies, federal prosecutors can choose to indict a defendant in the Seventh Circuit to ensure harsher punishment (or exert more leverage in plea negotiations). This Court's immediate resolution of the circuit conflict serves the interest of justice and fair sentencing.

IV. THIS CASE IS A CLEAN VEHICLE

The decision below presents the Court with a clean vehicle for resolving the circuit split. As noted above, in opposing other petitions for certiorari on this issue, the government has acknowledged that the "circuit conflict may warrant this Court's review in an appropriate case." *Sandoval* BIO at 11; *Gabayzadeh* BIO at 17. The facts of *Sandoval* and *Gabayzadeh* that were unsuitable for certiorari are not present here, making this case appropriate for review.

Unlike the defendants in *Sandoval* and *Gabayzadeh*, Mr. Peugh preserved this issue for review by raising it at his sentencing hearing in the district court and on appeal, and both courts addressed it. App. 5a; App. 28a; *supra* at 4-7. By contrast, the defendant in *Sandoval* did not raise the issue until her appeal to the Seventh Circuit. Because she had not preserved the issue, it could be reviewed only for plain error. *Sandoval* BIO at 12. The issue was likewise not preserved in Gabayzadeh. *See Gabayzadeh* BIO at 7 ("Petitioner did not address

th[e *ex post facto*] question at any point in the proceedings below, and neither the district court nor the court of appeals addressed it.").

Furthermore, the government argued in its *Sandoval* brief that use of the newer Sentencing Guidelines did not necessarily prejudice the defendant, because her sentence still fell within the range of the older guidelines. *Sandoval* BIO, at 13. Mr. Peugh's sentence under the 2009 Guidelines, in contrast, fell far outside the 1998 Guidelines range, and was indeed almost 50% greater than the upper limit of that range. *See supra* at 5-7. His sentence was at the very bottom of the 2009 range, implying that the district court might well have imposed a lower sentence if the range had been even lower. *See Turner*, 548 F.3d at 1100. There is at least a significant risk that the high 2009 Guidelines may have influenced the district judge to impose a longer sentence than he would have imposed under the 1998 Guidelines. Therefore, the Government cannot raise the same claim of lack of prejudice that it raised in *Sandoval*.

Finally, this Court often forgoes review in sentencing cases when it is likely that a sentence will expire before this Court could reach a decision. There is no such risk of mootness here. Mr. Peugh received his 70-month sentence in 2010, and thus he will remain in custody throughout the October Term 2012 in which this case would be decided. This case is the perfect vehicle for resolving the question presented.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

MARVIN PEUGH,

Defendant–Appellant.

No. 10–2184.

Argued Sept. 20, 2011.

Decided March 28, 2012.

Appeal from the United States District Court for the Northern District of Illinois, Western Division, Frederick J. Kapala, District Judge, Presiding. D.C. No. 08-CR-50014-1

Counsel Michael D. Love (argued), Attorney, Office of the United States Attorney, Rockford, IL, for Plaintiff–Appellee.

Allan A. Ackerman (argued), Attorney, Chicago, IL, for Defendant–Appellant.

Before ROVNER, WOOD and WILLIAMS, Circuit Judges.

OPINION

ROVNER, Circuit Judge:

Marvin Peugh was convicted after a jury trial of five counts of bank fraud, sentenced to 70 months' imprisonment, and ordered to pay nearly two million dollars in restitution. He challenges his conviction and sentence on the following grounds: that his indictment was multiplicitous; that the prosecution did not present sufficient evidence to prove his guilt beyond a reasonable doubt; that his sentence violated the ex post facto clause; that the district court miscalculated the loss and restitution amounts; that an enhancement for obstruction of justice should not have been imposed; and that the disparity between his sentence and his co-defendant's was improper. We affirm.

I.

In 1996 Peugh and his first cousin, Steven Hollewell, formed two companies to do business with the farmers of Illinois: the Grainery, Inc., which bought, stored, and sold grain, and Agri–Tech, Inc., which provided custom farming services to landowners and tenants. When the Grainery began to experience cash-flow problems in 1999, the cousins obtained bank loans from the State Bank of Davis

(later known simply as the State Bank) by falsely representing that valuable contracts existed for future grain deliveries from Agri–Tech to the Grainery. They also inflated the balances of bank accounts under their control by writing a series of bad checks between accounts. As a result of these activities, Peugh and Hollewell were charged with two bank-fraud schemes—loan fraud and check kiting—in violation of 18 U.S.C. § 1344.

The indictment alleged that from January 1999 to August 2000 Peugh and Hollewell executed both schemes multiple times. Counts 1–3 charged the two men with defrauding State Bank of more than $2.5 million by supporting loan applications with materially fraudulent and misleading information, specifically, financial reports describing the sham grain-delivery contracts between Agri–Tech and the Grainery. According to the indictment, Peugh and Hollewell applied for the first loan in January 1999 ($2,000,000), the second in February 2000 ($200,000), and the third in June 2000 ($350,000). Counts 4–9 of the indictment charged Peugh and Hollewell with five instances of check kiting by writing a series of bad checks between business and personal accounts. This scheme allowed the cousins to overdraw an account at Savanna Bank by $471,000.

Peugh pleaded not guilty to all charges. Hollewell pleaded guilty to one count of check kiting and agreed to testify against Peugh in exchange for the other counts being dropped.

At trial Hollewell testified that the grain-delivery contracts between Agri–Tech and the Grainery were a sham from the start: he and Peugh had never intended for Agri–Tech to deliver grain to the

Grainery and Agri–Tech had no means to fulfill the contracts. Hollewell's admissions were supported by the testimony of Bernard Reese, who was Agri–Tech's secretary and a member of its board of directors. Reese explained that Agri–Tech did not own any grain, that the board had never approved the buying or selling of grain, and that he had never seen the grain-delivery contracts before the criminal investigation of Peugh and Hollewell began. A representative from State Bank then testified that approval of the Grainery loans depended on the existence of the Agri–Tech grain-delivery contracts, which composed nearly half of the Grainery's assets in contracts.

The jury also heard testimony about the check-kiting scheme. An FBI expert on check kites described his analysis of Peugh and Hollewell's bank records and testified that the cousins had engaged in a check kite from April to August of 2000. Hollewell's father, Harlan Hollewell ("Harlan"), testified that his son and Peugh came to him in August 2000 after officials from Savanna Bank confronted them with an overdraft of approximately $471,000. According to Harlan, Peugh and Hollewell implored him to cover this deficit—they told him that the bank was demanding immediate payment and that they could face jail time if he did not supply the money—and he complied.

Peugh testified in his own defense. As to the grain-delivery contracts between Agri–Tech and the Grainery, he conceded that Agri–Tech had no grain to sell, but he insisted that the contracts were nonetheless made in good faith. Agri–Tech customers were to supply the grain, he claimed, though he

admitted that no Agri–Tech customer had actually agreed to supply grain. Regarding the check kite, Peugh maintained that he had not intended to defraud Savanna Bank; the bank was never in danger of loss, he said, because Harlan had previously promised to cover any overdrafts. (Harlan testified to the contrary.) Peugh could not explain, however, why he and Hollewell risked the check kite if Harlan was willing to supply the funds they needed. The jury found Peugh guilty of the charges in counts 3, 4, 5, 8, and 9 and acquitted him of the rest.

At sentencing Peugh raised a number of objections to the presentence report. He first argued that sentencing him under the 2009 guidelines (then in effect) rather than under the 1999 guidelines (in effect at the time he committed his offenses) would violate the ex post facto clause because it would result in a significantly higher sentencing range. The court rejected this argument based on *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006), in which we held that using the guidelines in effect at the time of sentencing rather than the time of the offense does not violate the ex post facto clause because the guidelines are merely advisory.

Peugh also challenged the presentence report's loss-amount calculation, contending that the loss amount should have been reduced by the interest he paid on the loans. The court, however, agreed with the government that the interest payments were irrelevant because they did not reduce the loans' outstanding principal balance. Peugh similarly argued that the money Harlan paid to cover the bank overdraft should be subtracted from the loss amount,

but the court explained that Harlan made this payment after the bank had detected the loss, and only money paid to a victim *before* detection of an offense can be deducted.

Peugh next objected to the presentence report's restitution calculation, arguing that he should not have to pay restitution for the loans described in counts 1 and 2 because he was acquitted on those counts. But the court concluded that the Mandatory Victim Restitution Act required restitution to be made for all three loans because a preponderance of the evidence showed all three to have been part of the loan-fraud scheme alleged in count 3, on which Peugh was convicted.

Finally, Peugh contended that he should receive the same prison sentence as Hollewell—12 months—to avoid an unwarranted disparity in sentences. The district court rejected this argument because, unlike Hollewell, Peugh went to trial, did not assist the government, and obstructed justice by perjuring himself.

The court sentenced Peugh within the guidelines to 70 months' imprisonment and three years' supervised release and made Peugh and Hollewell jointly and severally liable for restitution in the amount of $1,967,055.30. This was the total outstanding balance due on the three loans, less what the bank was able to recover by disposing of collateral. The check-kiting money was not included in the restitution amount because it had been repaid by Harlan.

II.

A. *Multiplicity*

On appeal Peugh argues for the first time that the indictment in his case was multiplicitous. An indictment is multiplicitous—and a violation of the Fifth Amendment's double jeopardy clause—if it charges a single offense in more than one count. *See United States v. Hassebrock*, 663 F.3d 906, 916 (7th Cir. 2011); *United States v. Allender*, 62 F.3d 909, 912 (7th Cir. 1995). According to Peugh, counts 1–3 charged him three times with fraudulently obtaining a single loan, and so his loan-fraud conviction should be reversed. Because Peugh did not raise this issue in the district court, we review for plain error. *See Hassebrock*, 663 F.3d at 916.

There was no plain error in the district court's failure to strike counts 1–3 for multiplicity. The indictment did not charge Peugh with fraudulently obtaining just one loan; rather, counts 1–3 charged him with fraudulently obtaining *three* loans in the course of a single bank-fraud scheme. Each loan constituted a separate "execution" of the scheme, and each execution of a bank-fraud scheme can be charged in a separate count. *See, e.g., Allender*, 62 F.3d at 912; *United States v. Longfellow*, 43 F.3d 318, 323 (7th Cir. 1994); *United States v. De La Mata*, 266 F.3d 1275, 1287 (11th Cir. 2001); *United States v. Colton*, 231 F.3d 890, 909 (4th Cir. 2000). Conduct generally qualifies as an "execution" rather than an "act in furtherance" when it is chronologically and substantively distinct and subjects the victim to additional risk of loss. *Longfellow*, 43 F.3d at 323–24. Here, although one bank made all of the loans, Peugh and Hollewell applied for each loan at a different

times with different supporting documents, and each loan put the bank at additional risk of loss.

B. *Sufficiency of Evidence*

Peugh next contends that the prosecution failed to prove one of the elements of his offense beyond a reasonable doubt: his specific intent to defraud State Bank. But intent need not be proved by direct evidence; the jury was free to infer Peugh's intent to defraud from his actions—for instance his submitting on three occasions fraudulent and misleading information to State Bank in support of loan applications—and disbelieve his contrary testimony. *See United States v. Howard*, 619 F.3d 723, 727 (7th Cir. 2010). Because a rational jury could have found beyond a reasonable doubt that Peugh intended to defraud State Bank, the evidence of his intent was sufficient to support his conviction. *See United States v. Durham*, 645 F.3d 883, 892 (7th Cir. 2011).

C. *Ex Post Facto/Demaree*

Peugh renews his argument that the district court violated the ex post facto clause by calculating his sentence under the 2009 rather than the 1999 guidelines, which were in effect at the time he committed his offenses. Under the 2009 guidelines, Peugh's advisory range jumped by more than 20 months. Peugh acknowledges that our holding in *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006), undercuts his position, but he urges us to reconsider that case and overrule it. We, however, stand by *Demaree*'s reasoning—the advisory nature of the guidelines vitiates any ex post facto problem—and again decline the invitation to overrule it, *see, e.g., United States v. Robertson*, 662 F.3d 871, 876 (7th Cir. 2011); *United States v. Holcomb*, 657 F.3d

445, 448–49 (7th Cir. 2011); *United States v. Favara*, 615 F.3d 824, 829 (7th Cir. 2010).

D. *Loss Amount*

Peugh maintains that the district court should have reduced the loss amount by $213,000—the interest he paid on the loans from State Bank—because he gave this money to his victim before the fraud was discovered. Under the guidelines, "money returned ... to the victim before the offense was detected" is to be credited against loss. U.S.S.G. § 2B1.1, Application Note 3(E)(i); *United States v. Hausmann*, 345 F.3d 952, 960 (7th Cir. 2003).

We have not had occasion to address whether interest payments should be credited against loss in fraudulent loan cases, but we conclude that the district court correctly declined to deduct Peugh's interest payments from the loss amount. These payments were not money "returned" to State Bank: they did not reduce the loans' outstanding principal balance; instead they were exchanged for value in the form of time holding the bank's money. *See United States v. Johnson*, 16 F.3d 166, 171 (7th Cir. 1994) (explaining that in fraudulent loan cases, loss is measured "by the difference in value exchanged rather than simply by the face value of the loan or by the gross amount of money that changes hands"). Moreover, the guidelines specify that "interest of any kind" is to be excluded from the loss amount. *See* U.S.S.G. § 2B1.1, Application Note 3(D)(i). This implies that interest, whether paid or unpaid, is to play no role in the loss calculation. In other words, if interest accrued does not increase the loss amount—and it did not here—then interest paid should not reduce it either. *See United States v. Allen*, 88 F.3d

765, 771 (9th Cir. 1996) ("[T]he district court used only the loan principal to calculate the 'amount of the loan;' it did not consider accrued interest. Therefore, payments made toward interest cannot be considered as repayments made on the loan."); *United States v. Coghill*, 204 Fed.Appx. 328, 330 (4th Cir. 2006) (unpublished) (holding that neither interest accrued nor interest paid should factor into the loss amount). Additionally, money spent to facilitate fraud is not deductible from the loss amount, *see United States v. Spano*, 421 F.3d 599, 607 (7th Cir. 2005), and Peugh's interest payments facilitated his loan-fraud scheme by keeping him in good standing with State Bank while he fraudulently obtained additional loans.

Peugh also contends, as he did in the district court, that the loss amount should have been reduced by the $471,000 that Harlan paid to cover the cousins' check-kiting overdraft. Harlan repaid this money to Savanna Bank years before Peugh and Hollewell were charged with a crime; according to Peugh, this means that the money was returned "before the offense was detected" by the victim. We disagree. A victim can detect an offense without understanding its full scope, and "[t]he time to determine [the] loss in a check-kiting scheme is the moment the loss is detected," *United States v. Mau*, 45 F.3d 212, 216 (7th Cir. 1995). Savanna Bank officials may have been unaware when they demanded repayment that they had uncovered part of a scheme involving at least 275 bad checks, but this does not undermine the district court's conclusion that the bank detected Peugh's offense as soon as it discovered its loss.

E. *Restitution*

Peugh renews his objection to paying restitution in the amount of $1,967,055.30, which is the sum of the outstanding balances of the three loans described in counts 1–3, less collateral. He points out that the jury acquitted him on counts 1 and 2 and that restitution can be assessed only for losses related to a count of conviction; thus, he reasons, he should only have to pay restitution for the $350,000 loan described in count 3.

Peugh is correct that he can be required to pay restitution only for losses caused by crimes of which he was convicted, *see United States v. Frith*, 461 F.3d 914, 920–21 (7th Cir. 2006); *United States v. Belk*, 435 F.3d 817, 819–20 (7th Cir. 2006), but he is wrong that the district court should not have ordered him to pay restitution for all three loans described in the indictment. When a "scheme" is an element of the offense of conviction—as it is in bank fraud, *see* 18 U.S.C. § 1344—the Mandatory Victim Restitution Act requires restitution for the losses caused by the *entire* scheme, even if the defendant is not convicted of all of the conduct that caused loss. *See* 18 U.S.C. § 3663A(a)(2); *Belk*, 435 F.3d at 819–20. Here, Peugh was convicted on count 3—which alleged that he fraudulently obtained a $350,000 loan as part of a broader scheme to defraud State Bank of more than $2.5 million—and the district court found by a preponderance of the evidence that the loans described in counts 1 and 2 were part of that scheme. Because restitution is calculated based on a preponderance of the evidence, *see* 18 U.S.C. § 3664(e); *United States v. Danford*, 435 F.3d 682, 689 (7th Cir. 2006)—a lower standard than beyond a

reasonable doubt—Peugh's acquittals on counts 1 and 2 had no bearing on the amount of restitution to be ordered for his conviction on count 3.

F. *Enhancement for Obstruction of Justice (Perjury)*

Peugh also argues that the district court abused its discretion by raising his offense level by two on the basis that he obstructed justice. We disagree. The district court explained that the obstruction-of-justice enhancement under U.S.S.G. § 3C1.1 was appropriate in this case because Peugh perjured himself at trial. The court cited evidence of Peugh's material, willful, and false statements, *see United States v. Ellis*, 548 F.3d 539, 545 (7th Cir. 2008), by discussing how his statements conflicted with the testimony of Steven Hollewell, Harlan Hollewell, and Bernard Reese. Peugh attributes these conflicts to lies or outdated recollections on the part of the others—noting for instance Harlan's inability to remember all the details of his business dealings with his son and Peugh—but we see no reason to disturb the district court's assessment of the testimony.

G. *Sentencing Disparity*

Finally, Peugh argues that the disparity between his six-year sentence and Hollewell's one-year sentence was improper under 18 U.S.C. § 3553(a)(6), which calls for similar sentences for similarly situated defendants. He points out that neither he nor Hollewell had prior convictions and that both were charged with the same offenses. That, however, is where the similarities end. Only Hollewell pleaded guilty and cooperated with the government. Peugh instead went to trial and obstructed justice by perjuring himself. Such distinctions warrant

disparate sentences. *See United States v. Doe*, 613 F.3d 681, 690–91 (7th Cir. 2010).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
Plaintiff,

v.

MARVIN PEUGH,
Defendant.

Case Number: 08 CR 50014-1
USM Number: 30209-424

Daniel J. Cain,
Defendant's Attorney.

Date of Imposition of Judgment May 04, 2010.

Filed May 12, 2010
by
Michael W. Dobbins
Clerk, U.S. District Court.

JUDGMENT IN A CRIMINAL CASE

The Defendant:

☐ Pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) which was accepted by the court. _____

☒ was found guilty on count(s) after a plea of not guilty. Three, Four, Five, Eight, & Nine of the Superseding Indictment

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 1344	Bank fraud	06/05/2000	3s
18 USC § 1344	Bank Fraud	08/2000	4s
18 USC § 1344	Bank Fraud	07/12/2000	5s
18 USC § 1344	Bank Fraud	07/21/2000	8s & 9s

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) One, Two, Six, & Seven of the Superseding Indictment

☒ Count(s) Counts 1-9 of Original Indictment ☐ is ☒ are dismissed.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special

assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

05/04/2010
Date of imposition of Judgment

/s/
Signature of Judge

Frederick J. Kapala, United States District Judge
Name and Title of Judge

Date May 11, 2010

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

70 Months on Counts 3, 4, 5, 8 & 9 of the Superseding Indictment to run concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:
The defendant should be designated to Oxford, Wisconsin.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on_____

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2 p.m. on July 12, 2010

☐ as notified by the United States Marshal.

☐ As notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED
STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

3 Years on Counts 3, 4, 5, 8, & 9 of the Superseding Indictment to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (*Check, if applicable.*)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (*Check, if applicable.*)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (*Check, if applicable.*)

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (*Check, if applicable.*)

☐ The defendant shall participate in an approved program for domestic violence. (*Check, if applicable.*)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

(1) the defendant shall not leave the judicial district without the permission of the court or

probation officer;

(2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) the defendant shall support his or her dependents and meet other family responsibilities;

(5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

(9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

(10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere

and shall permit confiscation of any contraband observed in plain view of the probation officer;

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

(1) If the special assessment and restitution are not paid in full during the term of incarceration, then, during the term of supervised release, the defendant shall pay to the clerk of court at least ten percent of the defendant's gross earnings minus federal and state income tax withholding to satisfy these obligations.

(2) The defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 500.00	$_____	$ 1,967,055.30

☐ The determination of restitution is deferred until_____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
State Bank 1718 S. Dirck Drive Freeport, IL 61032	1,967,055.30	1,967,055.30	
TOTALS	$ 1,967,055.30	$ 1,967,055.30	

☐ Restitution amount ordered pursuant to plea agreement $ _____.

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☒ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or*

years), to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payments to be made through the inmate financial responsibility program.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☒ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total

Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Marvin Peugh, 08 CR 50014-1, Total Amount: $1,967,055.30, Joint & Several Amount: $1,967,055.30 Steven Hollewell, 08 CR 50014-2, Total Amount $1,967,055.30, Joint & Several Amount $1,967,055.30

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARVIN PEUGH,

Defendant.

Docket Number: 08 CR 50014

VOLUME 2

TRANSCRIPT OF PROCEEDINGS

(Sentencing Hearing)

BEFORE THE HONORABLE
FREDERICK J. KAPALA

Rockford, Illinois

Tuesday, May 4, 2010

1:30 o'clock p.m.

APPEARANCES:

For the Government:

HON. PATRICK J. FITZGERALD
United States Attorney
(308 West State Street,
Rockford, IL 61101) by
MR. MICHAEL D. LOVE
Assistant U.S. Attorney

For the Defendant:

SREENAN & CAIN
(321 West State Street, Suite 803,
Rockford, IL 61101) by
MR. DANIEL J. CAIN
MR. CHRISTOPHER A. DE RANGO

Also Present:

MR. BRUCE BUHR
Special Agent, FBI

MS. JENNIFER TABORSKI
Probation Office

Court Reporter:

Mary T. Lindbloom
211 South Court Street
Rockford, Illinois 61101
(815) 987-4486

[Excerpt Page 28]

First defendant argues that the application of the 1999 guidelines manual would have resulted in a much lower total offense level than is calculated under the current manual, and, therefore, using the 2009 guidelines manual, quote, imposes a significant risk of enhanced punishment and is violative of the ex post fact clause facto clause of them Constitution. The defendant recognizes that the Seventh Circuit decision in United States v. Demaree, which held that a post-offense change in an advisory guidelines range does not create an ex post facto violation, but nonetheless continues to pursue this argument. The court is bound by the holding in Demaree, and, accordingly, the court overrules the defendant's objection to the use of the 2009 guidelines manual.

[Excerpt Pages 90-107]

I thank everyone for their efforts in helping to resolve these difficult issues. I've considered the presentence report and accompanying materials. I've considered the arguments made by the government and the defendant. I've considered the evidence that's been presented, as well as the defendant's statement. I've considered the sentencing guideline calculations and all of the other sentencing factors contained in Section 3553(a).

The defendant has been found guilty of five counts of bank fraud. With regard to determining an appropriate sentence, the guidelines calculations have taken into account the loss amount, the fact that the defendant obstructed justice, and his lack of criminal history.

I agree with the government that Mr. Peugh is more responsible for the loan fraud. In the count involving loan fraud, the defendant took a leadership role. I hold Mr. Hollewell and Mr. Peugh equally responsible for the check kiting offenses. I think Mr. Cain was right and I can see where he could conclude that during Mr. Hollewell's sentencing I said that Mr. Peugh was more responsible. I think Mr. Love has pointed out that I said that he urged and directed Mr. Hollewell in the check kiting scheme, but as I sit here now, I think they were both equally responsible for that.

I note that the fraud perpetrated by the defendant was an elaborate scheme. This was just not one instance of bad judgment. These offenses occurred over an extended period of time. The defendant literally had years in which to reflect on what he was doing and numerous opportunities to terminate his dishonest conduct.

In mitigation, the defendant has completed his associate's degree and has held steady employment throughout his life. He has had no prior history of arrests. The defendant's family is aware of his arrest and these offenses and remains supportive. He has the support of a great many people who have taken time away from their lives and their jobs and their activities to come here to court and demonstrate their high regard for him.

I note that this offense did not result in any physical harm to another person.

I note that the loss amount is just above the loss calculation that resulted in an offense level increase of 18. The next highest level increase is seven million.

I note, as Kevin Walsh observed, that he has endured much public scrutiny and professional discredit. He's received numerous letters of support. These letters are replete with statements describing the defendant as a kind, hardworking, sincere, generous, caring, and thoughtful person. The witnesses testifying today give the defendant high praise.

Clyde Pitts notes that the defendant is so considerate that he does not plow or plant when the wind is blowing toward Mr. Pitts' house or the clothesline. It's difficult for me to reconcile a person who is so thoughtful with the man who committed these offenses and caused literally millions of dollars in losses. In the eyes of the writers of these letters, Marvin Peugh is a good man, but sometimes people who are otherwise good commit illegal acts.

I tried as hard as I am able to make his trial as fair as possible. He had the assistance of one of the finest trial attorneys I know. Twelve people worked very hard on this case as jurors. They considered all the evidence, and, as we know, there was quite a bit of it. They deliberated sincerely and earnestly and unanimously came to a verdict. I am sure the jury didn't treat this case lightly. In fact, they acquitted Mr. Peugh of four of the nine counts pending against him.

Some people persist in the belief that Mr. Peugh did not commit this crime or these crimes, but they did not, as the jury did, see and hear all of the evidence presented in court. I believe that he did commit these crimes. I don't think that Marvin Peugh is an evil person, but sometimes desperate situations lead people to do desperate things.

Mr. Peugh broke the law, and when a person breaks the law in a small way, he pays a small price, but when a person breaks the law in a serious way, he pays a high price.

Sentencing is a very unpleasant part of my job. I dislike telling people who in other circumstances could be close acquaintances, close friends that he has to go to jail as punishment for committing a crime. I'll tell you what. I'd rather have root canal work than tell Marvin Peugh he has to go to jail, but I am charged with the duty and the obligation to impose the penalty in this case.

I recognize the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense. The sentence must afford adequate deterrence to criminal conduct. I believe there is a great and urgent need for the sentence in this case to be a general deterrence to other people that might be in a position to or consider doing these kinds of offenses. I feel there is little need to protect the public from further crimes of the defendant.

In his motion for a downward variance, the defendant argues that a sentence below the advisory guideline range is the most appropriate sentence in this case. In support of this argument, defendant references several considerations under Section 3553(a), such as the nature and circumstances of the offense, including his motives for committing the bank fraud, the history and characteristics of the defendant, including his age and lack of criminal history, and the need to avoid unwarranted sentencing disparities.

The court has carefully considered defendant's arguments, but at the same time it is important to recognize that there are several 3553(a) considerations present in this case that do not favor a sentence below the guideline range. Therefore, the court will be mindful of all the Section 3553(a) factors while considering the defendant's arguments.

First, the defendant argues that this court should consider cases from other district courts within the circuit that have sentenced defendants to below guideline ranges in fraud cases where the defendant was motivated by something other than a desire for profit or for personal financial gain. In support of this argument, defendant cites United States v. Milne, and United States v. Ranum, which somewhat interestingly are both authored by the same judge. I note initially that as district court cases, they would only be persuasive authority, not binding precedent, but after a review of these cases, I am not convinced that a below guideline sentence is warranted in the case.

In Milne the defendant caused a bank to suffer a loss of more than $500,000, but then he voluntarily reported his misconduct and cooperated with the bank in attempting to repay his debt, doing all this well before he was implicated in or charged with criminal activity. In addition to considering other factors, such as the character of the defendant, the court found that a reduced sentence was appropriate because the standard reduction for acceptance of responsibility did not fully account for defendant's voluntary reporting of his misconduct to the bank and his significant early efforts to ameliorate the effects

of such conduct. Those same considerations are not present in this case.

While it is true that the Milne court remarked that it was relevant that the defendant did not spend the bank's money on luxury items, but rather to prop up a failing business, it is unclear how much weight the court gave this consideration, and, in any event, it is evident that it was not the primary reason for the variance.

Moreover, the court rejects defendant's suggestion that his fraud was not driven by desire for profit or for personal gain just because he did not spend the money on luxury items. The fact of the matter is that if the Grainary would have done well, the defendant would have profited by that success.

Similarly, the court finds the opinion in Ranum distinguishable from the facts of this case. In Ranum a bank loan officer exceeded his authority by making repeated loans to a company over an extended period of time. Once the company's business plan failed, it could not repay the loan, thereby causing the bank a loss. The court noted that the defendant's culpability was mitigated in that he did not act for personal gain or for improper personal gain of another.

In this case, as I've said, the court finds that the defendant did act for personal gain, even if indirectly, by defrauding the banks into either giving his business a loan it should not have been given or by putting the banks at risk through the check kiting. Thus the court does not find that the defendant's motive for committing these offenses warrants any significant consideration in terms of mitigation.

Instead the court finds from its consideration of the nature and circumstances of the offenses that defendant committed some serious crimes with some very serious consequences. Through his actions and schemes, the defendant caused a loss of over 2.5 million to the banks that were unfortunate enough to do business with him.

Moreover, rather than owning up to his wrongdoing when the Grainary continued to fail, despite the fraudulently obtained loans, the defendant compounded his criminal activity by employing the check kiting scheme to keep the business afloat. In doing so, the defendant knowingly put various banks at risk of losing substantial amounts of money. Accordingly, on balance, the court finds that the nature and circumstances of the offense indicate the need for a strong sentence, not a more lenient one.

In a similar argument the defendant argues that the fraud guidelines rely too much on the amount of loss in determining the advisory sentencing range, that the Sentencing Commission failed to rely on empirical data when revising these guidelines, and, therefore, that these guidelines are not entitled to any deference.

It is true that after Kimbrough a sentencing judge can have his own penal philosophy at variance with that of the Sentencing Commission, but as noted in United States v. Higdon, 531 F.3d 561, the Seventh Circuit has cautioned that as a matter of prudence and in recognition of the Commission's knowledge, experience, and staff resources, an individual judge should think long and hard before substituting his

personal penal philosophy for that of the Commission.

Here the court does not disagree with the policy implicit in Section 2B1.1 of imposing increasingly stricter punishments on defendants that cause increasingly larger amounts of loss. As the background comment to Guideline Section 2B1.1 notes, ordinarily the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability. I am not convinced that this general policy should be disregarded in this particular case. I believe the authority defendant cites in support of his position is distinguishable from the circumstances of this case.

For example, defendant cites to a sentencing memorandum from the Southern District of New York, United States v. Adelson, again a district court decision that does not carry the weight of binding authority. In that case the defendant was a chief operating officer and president of a publicly traded corporation who engaged in a conspiracy to materially overstate his company's financial results and thereby artificially inflating the price of its stock. After the fraud was discovered, the share price declined by 88 percent, resulting in a combined loss, according to the government, of no less than $260 million. This amount, combined with other sentencing enhancements, resulted in a suggested sentence of life imprisonment. Noting that other factors impacted the stock price, the district court

rejected the government's proposed loss amount and found that the defendant's intended loss of between 50 to a hundred million was a more accurate approximation of the harm caused by the offenses.

Nevertheless, the loss amount still results in a 24-level increase that when combined with several other guidelines enhancements resulted in a recommended guideline sentence of life imprisonment, which the court in New York called an absurd guideline result that not even the government seriously defended. After commenting extensively on several Section 3553(a) factors, the judge in Adelson concluded that a sentence of three and a half years' imprisonment, coupled with a $50 million restitution amount, was the most appropriate sentence.

This case is quite different from Adelson in that it does not involve nearly the same amount of loss and certainly does not result in a, quote, absurd guideline recommendation of life imprisonment. Thus I am not persuaded that Adelson requires it to reject the policy behind Section 2B1.1 and in particular the use of loss amount as a determinative factor.

Likewise, the Bowman article that the defendant relies on discusses high profile fraud cases involving officers of public companies and cites as example the Enron case and the WorldCom case. In addition, in order to illustrate his point that the recommended sentences for these types of offenders has grown astronomically high, Bowman demonstrates the changes that have occurred over a period of time in the recommended guidelines range for a hypothetical corporate CEO convicted of securities laws violations that resulted in a loss of over 400 million. Because this article focuses on offenders at the extreme end of

the guidelines loss calculation, I don't believe it is very helpful or persuasive in a case such as this where the loss amount is much smaller.

Here the loss amount exceeded 2.5 million, which resulted in an 18-level enhancement. However, when considering that the base offense level in this case is only seven and considering the particular facts of this case, the court does not disagree with the policy of imposing a stricter punishment on defendants that cause significant amounts of loss. Accordingly, the court will give the amount of loss calculations and the resulting advisory guidelines range the appropriate amount of deference in this case.

In his motion for a downward variance, the defendant also makes several arguments concerning his history and characteristics that are properly considered under Section 3553(a). For instance, the defendant argues that his age of 56 and his lack of criminal history demonstrate that a lengthy term of imprisonment is not needed for deterrence or to protect the public from further crimes of the defendant. The government does not disagree with this assessment, but it does argue that these factors need to be considered in combination with all of the Section 3553(a) factors.

The court agrees that the defendant's age, which is not taken into account by the guidelines, and his lack of criminal history, which is accounted for by the guidelines, make it unlikely that the defendant will commit additional crimes in the future. These factors can sometimes support a variance below the guideline range. For this proposition I'll direct the parties to United States v. Carter, 538 F.3d 784, stating that a district court may properly consider a

defendant's age as it relates to the possibility of him committing crimes in the future, and United States v. Middlebrook, 553 F.3d 572, noting that the district court took into account the defendant's lack of prior criminal record. But these cases do not, of course, mandate a sentence below the guideline range.

I note, for example, United States v. Alday, 542 F.3d 571, in which the district court determined that the defendant's age of 64 did not warrant a lower sentence, and United States v. Hewelt, 295 Fed. Appx. 69, noting that the district court rejected the defendant's request for a below guideline sentence based in part on his age and the fact that he had no prior criminal history.

The court has considered the defendant's age and lack of criminal history, but finds that these factors are insufficient by themselves to support a sentence below the guideline range given the other Section 3553(a) considerations, including the seriousness of the offense and the need for general deterrence, which I said I find is high in a case such as this one.

The defendant also argues that his conduct should be considered aberrant behavior in an otherwise law-abiding life. Defendant cites to the aberrant behavior departure provision in the guidelines, Section 5K1.20, but that departure obviously would not apply because the defendant did not commit, quote, a single criminal occurrence or a single criminal transaction, close quote. These offenses involved significant planning, and the offenses were not of limited duration.

Nevertheless, the defendant argues that the court should reject these requirements because the Sentencing Commission failed to fulfill its

institutional role in promulgating this provision. The court finds no basis to disregard these reasonable restrictions as they merely define the parameters of what the Sentencing Commission felt was aberrant behavior.

In this case there is no question in my mind that the defendant's criminal conduct, which was drawn out over a long period of time, does not qualify as aberrant behavior. Accordingly, the court rejects defendant's request for an aberrant behavior departure or variance.

Another Section 3553(a) factor to consider is the need to provide restitution to any victims of the offense. Defendant argues that this factor warrants a sentence below the guidelines range because if he is imprisoned for an extended period of time, he will not be able to generate income from farming or maintain the leases he has for the land he rents for farming.

As Mr. Love notes, given the defendant's earning capacity and the amount of restitution, it does not appear that a variance would have a significant impact on his ability to satisfy the restitution in this case. Also, it is true that in any case where imprisonment is ordered along with restitution, the imprisonment will make restitution more difficult to pay. In any event, under the facts and circumstances of this case, the court does not deem the ability to pay restitution as a significant factor to support a variance.

Finally, defendant argues that based on the need to avoid unwarranted sentencing disparities, he should be given a sentence consistent with the sentence imposed on Steven Hollewell. I disagree with that proposition and find that any resulting

sentencing disparities are wholly warranted in this case. Mr. Hollewell pled guilty before trial. He showed a willingness to assume responsibility for his conduct, acknowledged his culpability, and assured the swift application of correctional measures to him. He did not obstruct justice by committing perjury during trial. These facts alone constitute a five-level difference in the total offense level calculation under the sentencing guidelines.

In addition to that, Mr. Hollewell also helped with the government's investigation and testified against the defendant at trial, thereby providing substantial assistance to the government. This resulted in a substantial downward departure pursuant to Section 5K1.1, further demonstrating that a difference in sentences among these codefendants is warranted.

Finally, the court recognized at the sentencing hearing for Mr. Hollewell that his role in securing the fraudulent obtained bank loans was minimal in comparison to Mr. Peugh's involvement. This also suggests a wide difference in sentences is proper.

In view of the foregoing, I have determined that a sentence within the guideline range is the most appropriate sentence in this case. I conclude that a sentence sufficient but not greater than necessary to comply with the purpose set forth in paragraph two of Section 3553(a) is as follows. I believe probation would deprecate the seriousness of the offender's conduct and would improperly minimize his culpability and would be inconsistent with the ends of justice.

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 70 months on each

count, three, four, seven, eight, and nine. This jail sentence is to be served concurrently on all the counts.

Upon release from imprisonment, the defendant shall serve a term of supervised release of three years on each of the counts to be served concurrently. The defendant shall comply with the standard conditions contained in the supervised release order and shall also comply with the following conditions. The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. The defendant shall cooperate with the collection of DNA as directed by the probation officer.

In regard to a fine, I have also considered the factors contained in Section 3572. The court declines to impose a fine in this case because the defendant is unable to pay a fine and is not likely to be able to do so. The defendant shall pay a special assessment of $100 on each count, for a total special assessment of $500. That amount is due immediately.

As to restitution, the government argues in its sentencing memorandum that the submission included in the third supplemental report -- I misstated that. The government argues in its sentencing memorandum and the submission included in the third supplemental report that restitution is owed to State Bank based on the entire scheme to defraud, which includes the loans referenced in Counts 1 and 2, for a total amount of $1,967,055.30. The court agrees that this amount is properly included as restitution and will be reflected in the judgment. The restitution obligation will be joint and several with Mr. Peugh's codefendant, Steven Hollewell.

The defendant indicated at the previous sentencing hearing that he objected to the inclusion of the loans referenced in Counts 1 and 2 because he was acquitted of those charges. It is true that restitution generally is limited to the loss caused by the crimes of which the defendant stands convicted. However, as the Seventh Circuit tells us in United States v. Belk, 435 F.3d 817, in a case in which the defendant is convicted of a scheme to defraud, restitution for the whole scheme is in order.

Here defendant in Count 3 of the superseding indictment was convicted of a scheme to defraud State Bank which began in or about January 1999 and continued through August of 2000, the object of which was to acquire loans totaling in excess of 2.5 million. Although each count, including Count 3, alleged a separate execution of the scheme, the defendant nevertheless was convicted of the entire scheme. Accordingly, the entire loss amount to State Bank is properly included in the restitution calculation.

In regard to restitution, I have also considered the factors contained in Sections 3663 and 3664. I will order that the defendant shall pay restitution of $1,967,055.30 to State Bank in Freeport, Illinois. That restitution is joint and several with the restitution obligation of Steven Hollewell. That restitution amount is due immediately.

During the term of incarceration, payment of the special assessment and restitution shall be made in accordance with the Bureau of Prisons Inmate Financial Responsibility Program. If the outstanding special assessment and restitution obligation are not paid in full during the term of incarceration, then

during his term of supervised release and as a condition of that supervised release, the defendant shall pay to the Clerk of the Court at least 10 percent of the defendant's gross earnings minus federal and state income tax withholding to satisfy the special assessment and restitution obligation.

The defendant shall notify the court and Attorney General of any material change in his economic circumstances that might affect the defendant's ability to pay restitution.

APPENDIX D

1998 FEDERAL SENTENCING GUIDELINES MANUAL

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level: **6**

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) $2,000 or less	no increase
(B) More than $2,000	add **1**
(C) More than $5,000	add **2**
(D) More than $10,000	add **3**
(E) More than $20,000	add **4**
(F) More than $40,000	add **5**
(G) More than $70,000	add **6**
(H) More than $120,000	add **7**
(I) More than $200,000	add **8**
(J) More than $350,000	add **9**
(K) More than $500,000	add **10**
(L) More than $800,000	add **11**
(M) More than $1,500,000	add **12**

(N) More than $2,500,000	add **13**
(O) More than $5,000,000	add **14**
(P) More than $10,000,000	add **15**
(Q) More than $20,000,000	add **16**
(R) More than $40,000,000	add **17**
(S) More than $80,000,000	add **18.**

(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by **2** levels.

(3) If the offense was committed through mass-marketing, increase by **2** levels.

(4) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increased by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

(5) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(6) If the offense involved (A) the conscious or reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **13**, increase to level **13**.

(7) If the offense –

(A) substantially jeopardized the safety and soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,

increase by **4** levels. If the resulting offense level is less than level **24**, increase to level **24**.

(c) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

§3C1.1. Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

CHAPTER FIVE-
DETERMINING THE SENTENCE

PART A - SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:

SENTENCING TABLE

(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4,5,6)
	1	0-6	0-6	0-6
	2	0-6	0-6	0-6
	3	0-6	0-6	0-6
	4	0-6	0-6	0-6
Zone A	5	0-6	0-6	1-7
	6	0-6	1-7	2-8
	7	0-6	2-8	4-10
	8	0-6	4-10	6-12
	9	4-10	6-12	8-14
Zone B	10	6-12	8-14	10-16
Zone C	11	8-14	10-16	12-18
	12	10-16	12-18	15-21
	13	12-18	15-21	18-24
	14	15-21	18-24	21-27
	15	18-24	21-27	24-30
	16	21-27	24-30	27-33
	17	24-30	27-33	30-37
	18	27-33	30-37	33-41
	19	30-37	33-41	37-46
	20	33-41	37-46	41-51
	21	37-46	41-51	46-57

	Offense Level	Criminal History Category (Criminal History Points) IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6
Zone A	2	0-6	0-6	1-7
	3	0-6	2-8	3-9
	4	2-8	4-10	6-12
Zone B	5	4-10	6-12	9-15
	6	6-12	9-15	12-18
Zone C	7	8-14	12-18	15-21
	8	10-16	15-21	18-24
	9	12-18	18-24	21-27
	10	15-21	21-27	24-30
	11	18-24	24-30	27-33
	12	21-27	27-33	30-37
	13	24-30	30-37	33-41
	14	27-33	33-41	37-46
	15	30-37	37-46	41-51
	16	33-41	41-51	46-57
	17	37-46	46-57	51-63
	18	41-51	51-63	57-71
	19	46-57	57-71	63-78
	20	51-63	63-78	70-87
	21	57-71	70-87	77-96

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4,5,6)
	22	41-51	46-57	51-63
	23	46-57	51-63	57-71
	24	51-63	57-71	63-78
	25	57-71	63-78	70-87
	26	63-78	70-87	78-97
	27	70-87	78-97	87-108
Zone D				
	28	78-97	87-108	97-121
	29	87-108	97-121	108-135
	30	97-121	108-135	121-151
	31	108-135	121-151	135-168
	32	121-151	135-168	151-188
	33	135-168	151-188	168-210
	34	151-188	168-210	188-235
	35	168-210	188-235	210-262
	36	188-235	210-262	235-293
	37	210-262	235-293	262-327
	38	235-293	262-327	292-365
	39	262-327	292-365	324-405
	40	292-365	324-405	360-life
	41	324-405	360-life	360-life
	42	360-life	360-life	360-life
	43	life	life	life

	Offense Level	Criminal History Category (Criminal History Points) IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	22	63-78	77-96	84-105
	23	70-87	84-105	92-115
	24	77-96	92-115	100-125
	25	84-105	100-125	110-137
	26	92-115	110-137	120-150
	27	100-125	120-150	130-162
Zone D				
	28	110-137	130-162	140-175
	29	121-151	140-175	151-188
	30	135-168	151-188	168-210
	31	151-188	168-210	188-235
	32	168-210	188-235	210-262
	33	188-235	210-262	235-293
	34	210-262	235-293	262-327
	35	235-293	262-327	292-365
	36	262-327	292-365	324-405
	37	292-365	324-405	360-life
	38	324-405	360-life	360-life
	39	360-life	360-life	360-life
	40	360-life	360-life	360-life
	41	360-life	360-life	360-life
	42	360-life	360-life	360-life
	43	life	life	life

APPENDIX E

2009 FEDERAL SENTENCING GUIDELINES MANUAL

§1B1.11. Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)

(a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.

(b) (1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

(2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.

(3) If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(c) Base Offense Level:

(1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) **6**, otherwise.

(d) Specific Offense Characteristics

(1) If the loss exceeded $5,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) $5,000 or less	no increase
(B) More than $5,000	add **2**
(C) More than $10,000	add **4**
(D) More than $30,000	add **6**
(E) More than $70,000	add **8**
(F) More than $120,000	add **10**
(G) More than $200,000	add **12**
(H) More than $400,000	add **14**
(I) More than $1,000,000	add **16**
(J) More than $2,500,000	add **18**
(K) More than $7,000,000	add **20**

(L) More than $20,000,000	add **22**
(M) More than $50,000,000	add **24**
(N) More than $100,000,000	add **26**
(O) More than $200,000,000	add **28**
(P) More than $400,000,000	add **30.**

(2) (Apply the greatest) If the offense—

(A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by **2** levels;

(B) involved 50 or more victims, increase by **4** levels; or

(C) involved 250 or more victims, increase by **6** levels.

(3) If the offense involved a theft from the person of another, increase by **2** levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.

(5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **2** levels.

(6) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans' memorial, increase by **2** levels.

(7) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense

involved obtaining electronic mail addresses through improper means, increase by **2** levels.

(8) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

(9) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(10) If the offense involved (A) the possession or use of any (i) devicemaking equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the

use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(11) If the offense involved conduct described in 18 U.S.C. § 1040, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

(12) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(13) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(14) (Apply the greater) If—

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by **2** levels; or

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by **4** levels.

(C) The cumulative adjustments from

application of both subsections (b)(2) and (b)(14)(B) shall not exceed 8 levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.

(15) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by **2** levels.

(16) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.

(ii) 18 U.S.C. § 1030(a)(5)(A), increase by **4** levels.

(iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.

(17) If the offense involved —

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a

registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator, increase by **4** levels.

(e) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g. 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

(4) If the offense involved a cultural heritage resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), if the resulting offense level is greater than that determined above.

§3C1.1. Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

CHAPTER FIVE-
DETERMINING THE SENTENCE
PART A - SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:

SENTENCING TABLE

(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)
	1	0-6	0-6	0-6
	2	0-6	0-6	0-6
	3	0-6	0-6	0-6
	4	0-6	0-6	0-6
Zone A	5	0-6	0-6	1-7
	6	0-6	1-7	2-8
	7	0-6	2-8	4-10
	8	0-6	4-10	6-12
	9	4-10	6-12	8-14
Zone B	10	6-12	8-14	10-16
	11	8-14	10-16	12-18
Zone C	12	10-16	12-18	15-21
	13	12-18	15-21	18-24
	14	15-21	18-24	21-27
	15	18-24	21-27	24-30
	16	21-27	24-30	27-33
	17	24-30	27-33	30-37
	18	27-33	30-37	33-41
	19	30-37	33-41	37-46
	20	33-41	37-46	41-51
	21	37-46	41-51	46-57

	Offense Level	Criminal History Category (Criminal History Points) IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6
Zone A	2	0-6	0-6	1-7
	3	0-6	2-8	3-9
	4	2-8	4-10	6-12
Zone B	5	4-10	6-12	9-15
	6	6-12	9-15	12-18
Zone C	7	8-14	12-18	15-21
	8	10-16	15-21	18-24
	9	12-18	18-24	21-27
	10	15-21	21-27	24-30
	11	18-24	24-30	27-33
	12	21-27	27-33	30-37
	13	24-30	30-37	33-41
	14	27-33	33-41	37-46
	15	30-37	37-46	41-51
	16	33-41	41-51	46-57
	17	37-46	46-57	51-63
	18	41-51	51-63	57-71
	19	46-57	57-71	63-78
	20	51-63	63-78	70-87
	21	57-71	70-87	77-96

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)
	22	41-51	46-57	51-63
	23	46-57	51-63	57-71
	24	51-63	57-71	63-78
	25	57-71	63-78	70-87
	26	63-78	70-87	78-97
	27	70-87	78-97	87-108
Zone D				
	28	78-97	87-108	97-121
	29	87-108	97-121	108-135
	30	97-121	108-135	121-151
	31	108-135	121-151	135-168
	32	121-151	135-168	151-188
	33	135-168	151-188	168-210
	34	151-188	168-210	188-235
	35	168-210	188-235	210-262
	36	188-235	210-262	235-293
	37	210-262	235-293	262-327
	38	235-293	262-327	292-365
	39	262-327	292-365	324-405
	40	292-365	324-405	360-life
	41	324-405	360-life	360-life
	42	360-life	360-life	360-life
	43	life	life	life

	Offense Level	Criminal History Category (Criminal History Points) IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	22	63-78	77-96	84-105
	23	70-87	84-105	92-115
	24	77-96	92-115	100-125
	25	84-105	100-125	110-137
	26	92-115	110-137	120-150
	27	100-125	120-150	130-162
Zone D				
	28	110-137	130-162	140-175
	29	121-151	140-175	151-188
	30	135-168	151-188	168-210
	31	151-188	168-210	188-235
	32	168-210	188-235	210-262
	33	188-235	210-262	235-293
	34	210-262	235-293	262-327
	35	235-293	262-327	292-365
	36	262-327	292-365	324-405
	37	292-365	324-405	360-life
	38	324-405	360-life	360-life
	39	360-life	360-life	360-life
	40	360-life	360-life	360-life
	41	360-life	360-life	360-life
	42	360-life	360-life	360-life
	43	life	life	life

APPENDIX F

2001 FEDERAL SENTENCING GUIDELINES AMENDMENT

617. Amendment:

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A replacement guideline with accompanying commentary is inserted as §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States).

.....

Chapter Two is amended by striking Part F in its entirety as follows:

"PART F - OFFENSES INVOLVING FRAUD OR DECEIT

§2F1.1. <u>Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States</u>

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (Apply the Greatest)	Increase in Level
(A) $2,000 or less	no increase
(B) More than $2,000	add 1
(C) More than $5,000	add 2
(D) More than $10,000	add 3
(E) More than $20,000	add 4
(F) More than $40,000	add 5
(G) More than $70,000	add 6
(H) More than $120,000	add 7
(I) More than $200,000	add 8
(J) More than $350,000	add 9
(K) More than $500,000	add 10
(L) More than $800,000	add 11
(M) More than $1,500,000	add 12
(N) More than $2,500,000	add 13
(O) More than $5,000,000	add 14
(P) More than $10,000,000	add 15
(Q) More than $20,000,000	add 16
(R) More than $40,000,000	add 17
(S) More than $80,000,000	add 18.

(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.

(3) If the offense was committed through mass-marketing, increase by 2 levels.

(4) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; or (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; or (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(5) If the offense involved—

(A) the possession or use of any device-making equipment;

(B) the production or trafficking of any unauthorized access device or counterfeit access device; or

(C) (i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or (ii) the possession of 5 or more means of identification that unlawfully were produced from another means of identification or obtained by the use of another means of identification,

increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(6) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was

committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(7) If the offense involved (A) the conscious or reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

(8) If the offense –

(A) substantially jeopardized the safety and soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,

increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

(c) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

.....

Effective Date: The effective date of this amendment is November 1, 2001.

APPENDIX G

2003 FEDERAL SENTENCING GUIDELINES AMENDMENT

653. Amendment: Sections 2B1.1, 2E5.3, 2J1.2, and 2T4.1, effective January 25, 2003 (see USSC Guidelines Manual Appendix C (Volume II), Amendment 647), are repromulgated with the following changes:

Section 2B1.1 is amended by striking subsection (a) as follows:

"(a) Base Offense Level: 6",

and inserting the following:

"(a) Base Offense Level:

(2)7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(3)6, otherwise."....

Effective Date: The effective date of this amendment is November 1, 2003.

OPPOSITION BRIEF

No. 12-62

In the Supreme Court of the United States

MARVIN PEUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Ex Post Facto Clause required the district court to consult the version of the advisory Sentencing Guidelines in effect at the time of petitioner's offenses, rather than the version in effect at the time of his sentencing, in determining the appropriate sentence under 18 U.S.C. 3553(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 675 F.3d 736.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2012. On June 13, 2012, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 10, 2012, and the petition was filed on July 16, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on five counts of bank fraud, in violation of 18 U.S.C. 1344. Pet. App. 15a. The district court sentenced petitioner to 70 months of imprisonment, to be

followed by three years of supervised release. *Id.* at 17a-18a. The court of appeals affirmed. *Id.* at 1a-13a.

1. Petitioner was the co-owner, along with his cousin, of two farming-related businesses in Illinois. Pet. App. 2a-3a. In 1999 and 2000, after one of the businesses began to suffer cash-flow problems, the cousins engaged in multiple fraudulent schemes to obtain access to additional capital. *Ibid.* They secured a series of bank loans, worth over $2.5 million, from the State Bank of Davis by falsifying the existence of valuable contracts between their two businesses. *Id.* at 3a. And they also wrote a series of bad checks between their personal and business accounts, allowing them to overdraw an account with Savanna Bank by nearly $500,000. *Ibid.*

In 2009, a grand jury in the Northern District of Illinois charged petitioner in a superseding indictment with nine counts of bank fraud, in violation of 18 U.S.C. 1344. Presentence Investigation Report (PSR) 3-5. After a trial, a jury convicted petitioner on five of those counts. *Id.* at 5.

2. Petitioner was sentenced in May 2010. Pet. App. 14a. Pursuant to 18 U.S.C. 3553(a), a sentencing court's "overarching duty" is to impose a "'sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in [18 U.S.C.] 3553(a)(2)." *Pepper* v. *United States*, 131 S. Ct. 1229, 1242 (2011) (quoting 18 U.S.C. 3553(a)). In carrying out that responsibility, the court is to consult a variety of factors, including the Guidelines promulgated by the Sentencing Commission. *Id.* at 1241. Since *United States* v. *Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines have been advisory, not mandatory: "although a sentencing court must 'give respectful consideration to the Guidelines, *Booker* permits the court to tailor the sentence in

light of other statutory concerns as well.'" *Pepper*, 131 S. Ct. at 1241 (quoting *Kimbrough* v. *United States*, 552 U.S. 85, 101 (2007)).

Federal law generally requires courts to consult the advisory Guidelines "in effect on the date the defendant is sentenced." 18 U.S.C. 3553(a)(4)(A)(ii). Congress adopted that approach so that sentencing courts would have the benefit of the Commission's up-to-date views on the appropriate sentencing ranges. See S. Rep. No. 225, 98th Cong., 2d Sess. 77 (1983). In a pre-*Booker* provision adopted when the Guidelines were mandatory, the Commission has specified that "[i]f the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." Sentencing Guidelines § 1B1.11(b)(1) (2009).

Consistent with Section 3553(a)(4)(A)(ii), the district court in petitioner's case consulted the 2009 Guidelines in effect when he was sentenced. Pet. App. 28a. It rejected petitioner's contention that, because the version of the Guidelines in effect when he committed his offenses recommended a lower advisory sentencing range, the Ex Post Facto Clause required the court to substitute them for the 2009 Guidelines. *Ibid.* [1] The district

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[1] The presentence report stated, as does the petition, that the 1998 version of the Guidelines was in effect when petitioner committed his offenses. PSR 8; Pet 4 n.2. In actuality, however, the 1999 version of the Guidelines (which became effective on Nov. 1, 1999) would apply, because all of the offenses for which petitioner was convicted occurred in 2000. See PSR 3-5. Petitioner's objection in district court, the district court's ruling on that objection, and the court of appeals' opinion all reference the 1999 Guidelines. See 08-CR-50014 Docket entry No. 156, at 1 (N.D. Ill. Apr. 2, 2010); Pet. App. 5a, 8a, 28a. In

court observed that, under governing circuit precedent, "a post-offense change in an advisory guidelines range does not create an ex post facto violation." *Ibid.* (citing *United States* v. *Demaree*, 459 F.3d 791 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007)).

The district court calculated that petitioner had an offense level of 27 under the 2009 Guidelines, applying an 18-level enhancement for loss in excess of $2.5 million and a 2-level enhancement for perjury on top of the base offense level of 7. 5/4/10 Sent. Tr. 28-42. The resulting advisory sentencing range was 70-87 months of imprisonment. *Id.* at 42. The presentence report advised the court that the Guidelines in effect at the time of the offenses would have produced a range of 30-37 months. PSR 20. After considering all of the sentencing factors under 18 U.S.C. 3553(a), and rejecting petitioner's requests for a departure or variance on various grounds, the court concluded that "a sentence within the guideline range is the most appropriate sentence in this case." Pet. App. 40a. The court emphasized, among other things, the "great and urgent need for the sentence in this case to be a general deterrence to other people that might be in a position to or consider doing these kinds of offenses." *Id.* at 31a; see *id.* at 38a ("[T]he need for general deterrence * * * is high in a case such as this one."). The court imposed a sentence of 70 months of imprisonment on each count, to run concurrently. *Id.* at 40a-41a.

3. The court of appeals affirmed the conviction and sentence. Pet. App. 1a-13a. As relevant here, the court adhered to its prior holding that "the advisory nature of

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all respects relevant to this case, the 1999 version of the Guidelines is the same as the 1998 version.

the guidelines vitiates any ex post facto problem" that might otherwise arise from consulting the Guidelines in effect at the time of sentencing rather than the Guidelines in effect at the time of the offense. *Id.* at 8a (citing, *inter alia*, *Demaree*, 459 F.3d at 795).

ARGUMENT

Petitioner contends (Pet. 7-21) that the district court violated the Ex Post Facto Clause by using the 2009 version of the Sentencing Guidelines to calculate his advisory sentencing range. The court of appeals correctly rejected that contention, and no further review is warranted.

1. As the government has explained in response to other recent petitions for writs of certiorari raising the question, the Sentencing Guidelines do not present any ex post facto concerns because they are advisory only. See, *e.g.*, Br. in Opp. at 9-14, *Hensley* v. *United States*, 130 S. Ct. 1284 (2010) (No. 09-480). In *Miller* v. *Florida*, 482 U.S. 423 (1987), this Court held that the Ex Post Facto Clause barred the retroactive application of revised state sentencing guidelines that increased a defendant's presumptive sentencing range compared to the guidelines in effect at the time that the defendant committed the offense. The Court reasoned that the new guidelines, which "ha[d] the force and effect of law," "substantially disadvantaged" the defendant, because the state system created a "high hurdle that must be cleared before discretion [could] be exercised" to impose a non-guidelines sentence. *Id.* at 432, 435. The Court distinguished the Florida guidelines system from the United States Parole Commission's guidelines, noting that the federal parole guidelines "simply provide flexible 'guideposts' for use in the exercise of discretion." *Id.* at 435.

Before *United States* v. *Booker*, 543 U.S. 220 (2005), the federal Sentencing Guidelines (unlike the former parole guidelines) were mandatory. Thus, like the Florida guidelines at issue in *Miller*, the federal Sentencing Guidelines "ha[d] the force and effect of laws," *id.* at 234, and significantly constrained sentencing courts' discretion to impose sentences outside of the Guidelines range. See 18 U.S.C. 3553(b)(1). Courts of appeals had therefore uniformly held that, under *Miller*, the Ex Post Facto Clause precluded sentencing a defendant under revised Guidelines that provided for a more severe sentence than was authorized by the Guidelines in effect when the defendant committed the offense. See, *e.g.*, *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994).

This Court's recent decisions explaining the role of the Guidelines in post-*Booker* sentencing, however, have made clear that the Guidelines are now only advisory and do not limit the discretion of sentencing courts in the manner that the guidelines at issue in *Miller* did. In *Rita* v. *United States*, 551 U.S. 338, 351-355 (2007), the Court held that sentencing courts cannot presume that a sentence within the advisory Guidelines range is reasonable or that a sentence outside the range is unreasonable. And while a court of appeals may apply a presumption that a within-range sentence is reasonable, that presumption has no "independent legal effect." *Id.* at 350. In *Gall* v. *United States*, 552 U.S. 38, 47 (2007), the Court held that a court of appeals cannot apply "a rigid mathematical formula" that would demand an increasingly strong justification the farther a sentence varies from the advisory Guidelines range. *Gall* emphasized that no "heightened standard of review" applies to sentences outside the Guidelines range; rather, "the abuse-

of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range." *Id.* at 49.

In subsequent decisions, the Court has made clear that sentencing courts may vary from the advisory range "based solely on policy considerations, including disagreements with the Guidelines," and that the Guidelines are just "one factor among several" that "courts must consider in determining an appropriate sentence." *Kimbrough* v. *United States*, 552 U.S. 85, 90, 101 (2007) (citation omitted); see *Pepper* v. *United States*, 131 S. Ct. 1229, 1247 (2011) ("[A] district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views."); *Spears* v. *United States*, 555 U.S. 261, 265 (2009) (per curiam). The Court has also held that no notice is required when a court sentences outside the advisory range based on the sentencing factors in 18 U.S.C. 3553(a), because defendants no longer have "[a]ny expectation subject to due process protection" that they will receive a sentence within the Guidelines range. *Irizarry* v. *United States*, 553 U.S. 708, 713 (2008). And the Court has underscored that the Guidelines are just one of the factors to be considered under Section 3553(a); the sentencing court's "overarching duty," after considering *all* of the factors, is to select a sentence that is "'sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in [18 U.S.C.] 3553(a)(2)." *Pepper*, 131 S. Ct. at 1242 (quoting 18 U.S.C. 3553(a)).[2]

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[2] Those purposes are:

the need for the sentence imposed—

2. Consistent with the views elaborated in this Court's decisions addressing the Guidelines after *Booker*, the Seventh Circuit held in *United States* v. *Demaree*, 459 F.3d 791 (2006), cert. denied, 551 U.S. 1167 (2007), that the Ex Post Facto Clause does not bar a district court from considering the version of the advisory Guidelines in effect at the time of sentencing, even when the version of the Guidelines in effect at the time of the offense provided for a lower advisory sentencing range. See *id.* at 794-795. Among other things, the Seventh Circuit pointed out that the Sentencing Guidelines are "advisory"; that the court is obligated to "consider" the applicable range, but may not "'presume'" that it is reasonable; that the selection of an appropriate sentence is "discretionary and subject therefore to only light appellate review"; and that a sentencing court is always permitted to consider a new guideline in sentencing:

> For when the Sentencing Commission changes a guideline, it does so for a reason; and since it is a body expert in criminal punishments, its reason is entitled to the serious consideration of the sentencing judge. A judge who said he was persuaded by the in-

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(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. 3553(a)(2).

> sight that informed the new guideline to give a sentence within the range established by it could not be thought to be acting unreasonably.

Ibid.

As petitioner notes (Pet. 8-9), the Second, Fourth, Sixth, Eleventh, and D.C. Circuits have disagreed, concluding that the Guidelines continue to implicate the Ex Post Facto Clause even though they are now advisory only. See, *e.g.*, *United States* v. *Wetherald*, 636 F.3d 1315, 1320-1324 (11th Cir.), cert. denied, 132 S. Ct. 360 (2011); *United States* v. *Ortiz*, 621 F.3d 82, 87 (2d Cir. 2010), cert. denied, 131 S. Ct. 1813 (2011); *United States* v. *Lanham*, 617 F.3d 873, 889-890 (6th Cir. 2010), cert. denied, 131 S. Ct. 2443 (2011); *United States* v. *Lewis*, 606 F.3d 193, 199 (4th Cir. 2010); *United States* v. *Turner*, 548 F.3d 1094, 1098-1100 (D.C. Cir. 2008). Several other circuits have stated or held, without analysis, that the Ex Post Facto Clause continues to apply to changes in the advisory Guidelines. See, *e.g.*, *United States* v. *Forrester*, 616 F.3d 929, 946-948 (9th Cir. 2010); *United States* v. *Wood*, 486 F.3d 781, 789-791 (3d Cir.), cert. denied, 552 U.S. 855 (2007). And a few courts of appeals have not resolved the issue. See, *e.g.*, *United States* v. *Murray*, 648 F.3d 251, 253-254 (5th Cir. 2011), cert. denied, 132 S. Ct. 1065 (2012); *United States* v. *Deegan*, 605 F.3d 625, 632 (8th Cir. 2010), cert. denied, 131 S. Ct. 2094 (2011).

3. Despite the disagreement, the applicability of the Ex Post Facto Clause to changes in the advisory Guidelines does not warrant this Court's review. First, the issue arises only in a limited number of cases. The question presented is relevant only when a defendant's advisory Guidelines range has been revised upwards between the time of his offense and the time of his sentenc-

ing. While the Commission does review the work of the courts and make alterations to the Guidelines as it deems appropriate, *Booker*, 543 U.S. at 263, as well as respond to congressional directives, *e.g.*, *Dorsey* v. *United States*, 132 S. Ct. 2321, 2329 (2012), it does not appear that the number or percentage of defendants whose range is increased between the time of the offense and sentencing is great, petitioner's speculation (Pet. 19) notwithstanding.[3]

Second, even in cases where the advisory Guidelines range has increased, that range does not control the ultimate sentence. While the Guidelines range is "the starting point and the initial benchmark, * * * [t]he Guidelines are not the only consideration." *Gall*, 552 U.S. at 49. Rather, the range is one of several factors that 18 U.S.C. 3553(a) requires a sentencing court to consider in determining the appropriate sentence. The court may not treat the range either as binding or as presumptively reasonable. See, *e.g.*, *Gall*, 552 U.S. at 46-50; *Rita*, 551 U.S. at 351-355. The sentencing court

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[3] While the federal courts of appeals decided over 18,000 criminal appeals in fiscal years (FY) 2010 and 2011 combined, a Westlaw search reveals that only 114 circuit decisions (published or unpublished) during that period—well under one percent—even mention "ex post facto" and "guideline[s]" in the same paragraph. See U.S. Sentencing Comm'n, *2010 Sourcebook of Federal Sentencing Statistics* 135-137 tbl. 55; U.S. Sentencing Comm'n, *Types of Appeal in Each Circuit and District, Fiscal Year 2011*, http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table55.pdf. Similarly, while the Seventh Circuit has decided nearly 550 criminal appeals in each of those fiscal years, see *ibid.*, only ten Seventh Circuit decisions (published or unpublished) over the past 12 months have cited *Demaree*. And while the Fifth Circuit has decided the most criminal appeals of any circuit during those fiscal years—over 3000 in all, see *ibid.*—it has done so without ever definitively resolving the question presented, see p. 9, *supra*.

must give "both parties an opportunity to argue for whatever sentence they deem appropriate" and "must make an individualized assessment based on the facts presented." *Gall*, 552 U.S. at 49-50. And the sentencing court may decide as a matter of policy that the recommended range fails to suggest a sentence that is sufficient, but not greater than necessary, to achieve the statutory purposes of sentencing. See, *e.g.*, *Pepper*, 131 S. Ct. at 1247; *Rita*, 551 U.S. at 351 (parties may present argument that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps * * * the case warrants a different sentence regardless"). As a result, sentencing courts may, and often do, conclude that a particular defendant should receive a sentence different from what the advisory Guidelines recommend. See, *e.g.*, Pet. 15 (noting that courts impose sentences below the advisory range 25% of the time); Ill. Ass'n of Criminal Defense Lawyers Amicus Br. 8 (reporting that approximately 44% of sentences in Illinois were below the Guidelines range, including 29.1% that did not involve a government motion).

In a case where the Guidelines have been amended between the time of the offense and the time of sentencing, a court may—and likely should—take counsel from both the former and the current Guidelines (as well as the reasons for the amendment) in the course of considering what sentence would be most consistent with the Section 3553(a) factors. See *United States* v. *Rodriguez*, 630 F.3d 39, 42 (1st Cir. 2010); *Deegan*, 605 F.3d at 631-632; see also *United States* v. *Gilmore*, 599 F.3d 160, 165-166 (2d Cir. 2010). In those circumstances, a judge's consideration of a new and increased Guidelines range does not defeat any expectation that the defendant may have had when he committed the offense of receiving a

lower, within-range sentence. See *Irizzary*, 553 U.S. at 713 (post-*Booker*, a defendant has no due-process-protected expectation that he will receive a sentence with the presumptively applicable guideline range). And a Seventh Circuit defendant whose Guidelines range has increased can urge the sentencing court to look to the earlier and lower range as reflecting a sounder balance of sentencing policies, with no presumption that the current Guidelines range is reasonable. Given the district court's discretion to consider both ranges, the Seventh Circuit's minority position on the ex post facto issue is not a sufficiently pressing question of federal law as to warrant this Court's intervention.[4]

To the extent petitioner suggests (Pet. 15-16) that the district court in this particular case was overly deferential to the Sentencing Guidelines, he was free to raise that circumstance-specific objection on appeal. See *Nelson* v. *United States*, 555 U.S. 350, 352 (2009) (per curiam) (summarily reversing when district court applied a presumption of reasonableness to the Guidelines range). Review is not warranted, however, on the question of which non-binding set of advisory guidelines the district court was required to consult.

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[4] Petitioner briefly suggests (Pet. 13) that the question presented will influence plea decisions. But the question presented will have no special impact on the sentencing of defendants who plead guilty. A sentencing court typically has the same sentencing discretion following a plea as it does following a trial. And a defendant who wants greater certainty may, with the court's agreement, enter a plea that requires the court to impose a specific sentence. Fed. R. Crim. P. 11(c)(1)(C).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2012

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 12-62

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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REPLY BRIEF

The Government's mild opposition underscores the need for this Court's review. The Government does not contest the circuit conflict; it acknowledges that at least seven circuits apply the Ex Post Facto Clause to forbid retroactive application of Sentencing Guidelines enhancements, with a number of those courts expressly rejecting the position of the Seventh Circuit below. Opp. 9; Pet. 8-11. The Government does not deny that the circuit conflict is intractable; indeed, the Seventh Circuit has repeatedly reaffirmed its precedent and has declined to rehear the issue en banc, entrenching the circuit split. Pet. 11; Opp. 8-9. Finally, the Government does not deny that this case is an ideal vehicle for resolving the conflict. Pet. 20-21.

Instead, the Government devotes much of its brief to arguing the merits. Opp. 5-7; *see also id.* at 10-12. But it nowhere addresses or justifies the Seventh Circuit's express refusal to apply this Court's "significant risk" test under the Ex Post Facto Clause. *Compare Garner* v. *Jones*, 529 U.S. 244, 255 (2000), *with United States* v. *Demaree*, 459 F.3d 791, 794-95 (7th Cir. 2006). If, on the other hand, the Government were right that most circuits are applying an erroneous standard, the prevalence of that error would itself warrant this Court's review.

The Government's only other objection is to the issue's importance. Despite having twice conceded

that this "circuit conflict may warrant this Court's review in an appropriate case,"[1] the Government now backtracks, claiming that the issue is insignificant and arises infrequently. Opp. 9-10 & n.3. This is far from the case. The issue has already arisen at least hundreds of times and promises to keep recurring, particularly because the Sentencing Commission regularly revises Guideline sentences upward. As a result, in the Seventh Circuit, federal criminal defendants face higher sentences than those in the rest of the country, tempting prosecutors to forum-shop. Only this Court can resolve this entrenched, recurring disagreement about the application of the U.S. Constitution and bring uniformity to criminal sentencing across the country.

1. The Ex Post Facto Clause is violated wherever there is a "significant risk" that retroactive application of new sentence enhancements will raise a defendant's punishment. *See Garner*, 529 U.S. at 255. The Seventh Circuit has admitted that this formula, "interpreted literally, would encompass a change in even voluntary sentencing guidelines, for official guidelines even if purely advisory are bound to influence judges' sentencing decisions." *Demaree*,

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[1] Brief for the United States at 10-11, *Sandoval* v. *United States*, No. 11-9492 (S. Ct. May 2012); Brief for the United States at 16-17, *Gabayzadeh* v. *United States*, No. 11-1034 (S. Ct. May 2012).

459 F.3d at 794. Nevertheless, *Demaree* held that this Court could not have meant what it said in *Garner*. *Id.* The Seventh Circuit proclaimed "that the ex post facto clause should apply only to laws and regulations that bind rather than advise," and that the Guidelines post-*Booker* fall into the latter category. *Id.* at 795. The Government never defends the Seventh Circuit's rejection of this Court's precedents, or explains why the "significant risk" standard governs discretionary parole decisions but not discretionary sentencing.

The Seventh Circuit's rule conflicts not only with this Court's "significant-risk" standard under the Ex Post Facto Clause, but also with the "presumption of reasonableness" that sentences within Sentencing Guideline ranges may carry. *Rita* v. *United States*, 551 U.S. 338, 347 (2007); Pet. 12-14. While the Guidelines are no longer binding, Opp. 6-7, 10-11, they remain "the starting point and the initial benchmark" for sentencing. *Gall* v. *United States*, 552 U.S. 38, 49 (2007). In practice, they carry significant weight and thus are very likely to influence sentences. IACDL Amicus Br. 6-10. As the Government acknowledges, judges typically sentence within the federal Guidelines, and accordingly higher Guidelines increase the punishment imposed. Pet. 15; Opp. 11; IACDL Amicus Br. 8.

The Government claims that ex post facto problems arise only if the defendant is sentenced

under mandatory guidelines, as in *Miller v. Florida*, 482 U.S. 423 (1987). Opp. 5. But nothing in *Miller* contravenes the "significant risk" standard that this Court subsequently announced in *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), and reaffirmed in *Garner*. While application of mandatory rather than advisory guidelines may heighten the risk of increased punishment, in every case the Ex Post Facto Clause demands a "rigorous analysis of the level of risk created by the change in law." *Garner*, 529 U.S. at 255. Here, a substantial change in the sentencing range that a district court must use as the starting point certainly creates a significant risk of increased punishment. Mr. Peugh's sentence is case in point; the amendment of the Guidelines increased his sentencing range to 70-87 months, and the district court's express decision to sentence him within that range resulted in a sentence of 70 months. The amendment thus directly resulted in a higher sentence than the court would have imposed if it had applied the 37-46 month sentencing range called for by the 1998 Guidelines in effect at the time Mr. Peugh committed his offense. Pet. 5-7.

The Government responds by equating a defendant's ex post facto right not to face higher sentences with a mere hope for notice of sentence increases, which is not guaranteed as a matter of due process. *Irizarry* v. *United States*, 553 U.S. 708, 713 (2008); Opp. 7, 12. *Irizarry* stands for the proposition

that post-Booker defendants have no due process right to notice because, after *Booker*, "parties are inherently on notice that the sentencing guidelines range is advisory." *Irizarry*, 553 U.S. at 712 (internal quotation marks omitted); *id.* at 713-14 ("Any expectation subject to due process protection ... did not survive our decision in [*Booker*] ... [because] neither the Government nor the defendant may place the same degree of reliance on the type of 'expectancy' that gave rise to a special need for notice [pre-*Booker*]."). But the Ex Post Facto Clause requires more than just notice. *See Miller*, 482 U.S. at 431 ("The constitutional prohibition against ex post facto laws cannot be avoided merely by adding to a law notice that it might be changed."). It "also restricts governmental power by restraining arbitrary and potentially vindictive legislation," *Weaver v. Graham*, 450 U.S. 24, 29 (1981), including laws creating a "significant risk" of a heavier punishment, even within the authorized range. *Garner*, 529 U.S. at 255. Notice questions aside, the Ex Post Facto Clause prohibits laws creating a significant risk that Mr. Peugh would suffer greater punishment than he would have received at the time of his offense.

2. This constitutional issue is intrinsically important. It results in systematically higher sentences any time the Guidelines are revised upwards. The persistence of the split allows different federal districts to continue to impose

different punishments for the very same crimes. Criminal defendants in the Seventh Circuit are treated differently than similarly situated defendants in at least seven other circuits. In addition, federal prosecutors at Main Justice have some choice of venue in multi-jurisdictional cases. In those cases, *Demaree* could tempt them to file cases in the Seventh Circuit, in order to use its heavier penalties as leverage in plea-bargaining. *See* Pet. 13.

3. The Government's claim that the issue arises too infrequently to warrant review is unconvincing. Contrary to the Government's analysis, the 114 circuit court decisions discussing the Ex Post Facto Clause in relation to Guidelines in just the past two years, and the ten Seventh Circuit decisions citing *Demaree* in just the past year, demonstrate (if anything) that the issue recurs frequently. *See* Opp. 10 n.3. Furthermore, in focusing on the number of federal appellate decisions in the last year or two, the Government misses the much larger universe of district court sentences that may not result in appellate opinions. *Demaree*'s holding has been cited in hundreds of cases, briefs, and motions and dozens of treatises and law review articles.[2] Even these numbers understate the

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[2] A Westlaw search for citations to the *Demaree* headnote regarding whether the Ex Post Facto Clause applied to amendments to the Sentencing Guidelines found 131 cases, 342 court documents, 13

frequency with which the issue arises. Confronted with page limitations on appeals and a Seventh Circuit that has repeatedly refused to re-examine its position, many defendants likely forego altogether raising an argument that will be of little avail. Notably, the Illinois Association of Criminal Defense Lawyers thought this issue important enough to warrant filing an amicus brief. IACDL Amicus Br. 11-15. Conversely, thousands of defendants in other circuits currently benefit from entrenched precedents adopting the contrary rule without having to litigate it further.

The more pertinent measure of importance is that in the common circumstance when the U.S. Sentencing Commission increases Guideline ranges, this issue will arise *every time* as to any defendant who committed the offense before the effective date of the amendment. The U.S. Sentencing Commission has raised offense levels for more than 100 offenses over the past ten years.[3] For example, in response to

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treatises and encyclopedias, and 17 law review and journal articles on the subject.

[3] A review of the amendments to the Sentencing Guidelines between 2003 and the present revealed nearly 100 enhancements of two or more levels, with increases of as many as ten levels. U.S. SENTENCING GUIDELINES MANUAL app. C, vol. II at 285 to vol. III at 422 (2011).

the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (2002), the Commission promulgated new Guidelines in 2003 that increased recommended sentences for, among other things, defendants convicted of larceny, embezzlement, and other property crimes. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2003). The revisions included providing for a higher base offense level, adding new enhancements for offenses resulting in a very large loss, and enhancements for offenses harming many victims.[4] Penalties under § 2B1.1 are important: from 2006 through 2011, 11.3% of offenders sentenced under the Guidelines nationally were sentenced under § 2B1.1, including 3,233 offenders in the Seventh Circuit. U.S. SENTENCING COMMISSION, INTERACTIVE SOURCEBOOK, tbl.17, *available at* http://isb.ussc.gov/USSC?userid=USSC_Guest&password=USSC_Guest.

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[4] U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 653 (2011) (increasing the base offense level of § 2B1.1(a)(1) from 6 to 7 where defendant was convicted of a 2B1.1 offense and where the statutory maximum is 20 years of imprisonment); *id.* at amend. 647 (increasing the maximum enhancement in § 2B1.1(b)(1)(O)-(P) for causing large financial loss from 26 to 30 and increasing the maximum enhancement in § 2B1.1(2)(C) for harming many victims from 4 to 6 levels).

Additionally, pursuant to the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act), Pub.L. No. 108-21, 117 Stat. 650 (2003), the 2004 Guidelines contain a number of enhancements for crimes involving child pornography. Between 2006 and 2011, 505 individuals were sentenced in the Seventh Circuit under these Guidelines. *Id.* As part of the enhancements, the base level offense was increased from 17 for possession and receipt to 18 for possession and 22 for receipt, and new enhancements were added for the number of pictures involved. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 664 (amending § 2G2.2(a), (b)(7)). In fiscal year 2011, 1,608 (96%) of offenders sentenced nationally under § 2G2.2 received an enhancement for the number of pictures, with 1,188 (70.9%) receiving a 5-level enhancement for trafficking in more than 600 images. U.S. SENTENCING COMMISSION, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS 42 (2011).

4. Furthermore, the federal policy of uniformity in sentencing and basic principles of fairness in our criminal justice system require resolution of the question before this Court. It undermines faith in federal justice when the U.S. Constitution has different application to criminal sentences in different federal courts, or when a defendant like Mr. Peugh faces a sentencing range of 70-87 months for commission of a federal crime in

Illinois, but would have faced only a 37-46 month range if he committed the exact same federal crime in an adjoining state (Kentucky). *See United States v. Lanham*, 617 F.3d 873, 889–90 (6th Cir. 2010) (rejecting *Demaree*), *cert. denied*, 131 S. Ct. 2443 (2011). *See* Pet. 5-7. While Mr. Peugh's case is a particularly stark instance of injustice, any effect on actual criminal punishment is constitutionally significant. *See Glover* v. *United States*, 531 U.S. 198, 203 (2001) (holding, in the Sixth Amendment context, that even additional days of incarceration are not *de minimis).*

Only this Court can resolve this significant division among the circuits, settling the application of the Ex Post Facto Clause of the U.S. Constitution. Further review is warranted.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in the petition, this Court should grant the petition.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-62

In The
Supreme Court of the United States

MARVIN PEUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF AMICUS CURIAE THE ILLINOIS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Seventh Circuit's holding in *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006), violate the Ex Post Facto Clause of the Constitution by allowing retroactive application of the U.S. Sentencing Guidelines when the Guidelines in effect at the time of sentencing create a significant risk of a harsher sentence than would have been imposed under the Guidelines in effect at the time of the crime?

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INTEREST OF THE AMICUS CURIAE

The Illinois Association of Criminal Defense Lawyers (IACDL) is a not-for-profit organization dedicated to defending the rights of all persons as guaranteed by the U.S. Constitution. Its membership consists of private criminal defense lawyers, public defenders, investigators, and law professors throughout the State of Illinois. The mission of IACDL is to preserve the adversary system of justice; to maintain and foster independent and able criminal defense lawyers; and to ensure due process for persons accused of crimes.

The members of IACDL, an organization that consistently advocates for the fair and efficient administration of criminal justice, have a keen interest in assuring that their clients do not receive sentences that are greater because of the defendant's geographical location, and that they are sentenced in compliance with the Ex Post Facto Clause.[1]

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[1] Amicus notified the parties of the intention to file this brief ten days prior to the brief's due date. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

SUMMARY OF ARGUMENT

This case presents this Court with an opportunity to clarify – in agreement with all circuit courts but one – that district courts should rely on the version of the U.S. Sentencing Guidelines in effect at the time of the offense if the version in effect at the time of sentencing would result in a higher Guidelines range. The Seventh Circuit has erroneously held that calculating the Guidelines range based on a later, more severe version of the Guidelines does not violate the Ex Post Facto Clause of the U.S. Constitution because the Guidelines are advisory.

The Seventh Circuit's holding ignores two critical points. First, the Seventh Circuit ignores that the Guidelines retain a mandatory character insofar as the Guidelines range must be calculated, even though the final Guidelines range is not binding, so courts continue to give the Guidelines great weight. Second, because the Guidelines range has a demonstrable gravitational pull on sentences imposed, the Seventh Circuit's rule places Illinois (and Wisconsin and Indiana) defendants at near-certain risk of a higher sentence because only the Seventh Circuit uses the later, harsher Guidelines as a benchmark in a case like Mr. Peugh's. Illinois defendants are therefore punished more harshly solely because of their geography.

Amicus, as the representative of criminal defense lawyers whose clients are uniquely affected by the

Seventh Circuit's minority view on this issue, urges this Court to review this case.

ARGUMENT

I. The Guidelines Range Is the Mandatory Starting Point and Benchmark for All Sentences Imposed.

A. District courts must correctly calculate the Guidelines range and use it as the starting point and initial benchmark.

A district court is not free to ignore the U.S. Sentencing Guidelines. The Court's direction to district courts is unambiguous – the Guidelines must be considered first. "As a matter of administration and to secure nationwide consistency, the Guidelines should be **the starting point and the initial benchmark**." *Gall v. United States*, 552 U.S. 38, 49 (2007) (emphasis added); *see also Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) ("The Guidelines provide a framework or starting point – a basis, in the commonsense meaning of the term – for the judge's exercise of discretion.").

Consideration of the Guidelines range is so important that failure to correctly calculate it is reversible error. *See Gall*, 552 U.S. at 51 (holding that in reviewing a sentence, the appellate court "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range"). District

courts must also justify any deviation from the sentencing range recommended by the Guidelines:

> A district judge **must give** serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. For even though the Guidelines are advisory rather than mandatory, they are, as we pointed out in *Rita*, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.

Id. at 46 (emphasis added). This Court has instructed district courts that they "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance," *id.* at 50, and has instructed courts of appeals that they will "take into account . . . the extent of any variance from the Guidelines range," *id.* at 51.

While this Court has recognized that not every guideline is the product of careful study, *id.* at 46 n.2, *Kimbrough v. United States*, 552 U.S. 85, 96 (2007), even when a guideline is unsound, it still "must [be] treat[ed] . . . as the 'starting point and the initial benchmark.'" 552 U.S. at 108 (quoting *Gall*, 552 U.S. at 49). Moreover, once a court correctly calculates the Guidelines range and sentences the defendant within that range, the sentence may be presumed reasonable. *Rita v. United States*, 551 U.S. 338, 351 (2007). The

Seventh Circuit has adopted a presumption of reasonableness. *See United States v. Vizcarra*, 668 F.3d 516, 527 (7th Cir. 2012) ("A sentence within a properly calculated guidelines range is presumed to be reasonable; it is the defendant's burden to overcome the appellate presumption."); *United States v. Jackson*, 547 F.3d 786, 792 (7th Cir. 2008).

Therefore, even though district courts have the authority to vary from the Guidelines range, district courts **must begin** with the Guidelines. It is this required starting point that "create[s] a significant risk of increasing [the defendant's] punishment" and thereby violates the Ex Post Facto Clause when the Guidelines in effect at the time of sentencing call for a harsher punishment than the Guidelines in effect at the time of the crime. *Garner v. Jones*, 529 U.S. 244, 255 (2000).

Because of this practical reality, the majority of circuits have concluded that defendants must have the opportunity to show on an as-applied basis that use of the newer version of the Guidelines creates a "substantial risk" of a harsher sentence. *See United States v. Turner*, 548 F.3d 1094, 1099-100 (D.C. Cir. 2008); *United States v. Ortiz*, 621 F.3d 82, 85-88 (2d Cir. 2010); *United States v. Lewis*, 606 F.3d 193, 198-203 (4th Cir. 2010); *United States v. Lanham*, 617 F.3d 873, 889-90 (6th Cir. 2010); *United States v. Wetherald*, 636 F.3d 1315, 1320-22 (11th Cir. 2011).

Only the Seventh Circuit precludes its district courts from any Ex Post Facto Clause analysis in

cases like Mr. Peugh's. *See United States v. Peugh*, 675 F.3d 736, 741 (7th Cir. 2012) ("We, however, stand by *Demaree*'s reasoning – the advisory nature of the guidelines vitiates any ex post facto problem – and again decline the invitation to overrule it.") (citing *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006)). Ignoring the mandatory role of the Guidelines in calculating sentences, the Seventh Circuit has unilaterally held that the Guidelines no longer are constrained by the Ex Post Facto Clause. *Id.* In so doing, the Seventh Circuit acknowledged yet declined to follow this Court's standard for determining an Ex Post Facto Clause violation – *Garner*'s "significant risk" standard – in order to reach its unconstitutional conclusion. *Demaree*, 459 F.3d at 794 (stating that the Supreme Court's test for determining Ex Post Facto Clause violations "interpreted literally, would encompass a change in even voluntary sentencing guidelines" but declining to so interpret the law).

B. In practice, district courts sentence within the Guidelines range most of the time and use it as an anchor when varying from it.

Not surprisingly, district courts follow this Court's instruction and begin with the Guidelines. The Guidelines have a strong gravitational pull because they are the only 18 U.S.C. § 3553(a) factor with a numerical value. This number has an anchoring effect, and a sentence within or near the Guidelines range will likely avoid reversal on appeal.

The Guidelines range "serves as a psychological 'anchor,' which appears to simplify or obviate the daunting task of evaluating the seriousness of the offense, the dangerousness of the offender, and other considerations relevant to the statutory purposes." Paul J. Hofer, *Beyond the "Heartland": Sentencing Under the Advisory Federal Guidelines*, 49 Duq. L. Rev. 675, 689 (2011). As the Honorable Nancy Gertner has explained,

> Anchoring is a strategy used to simplify complex tasks, in which numeric judgments are assimilated to a previously considered standard. When asked to make a judgment, decision-makers take an initial starting value (*i.e.*, the anchor) and then adjust it up or down. Studies underscore the significance of that initial anchor; judgments tend to be strongly biased in its direction.

Hon. Nancy Gertner, *What Yogi Berra Teaches About Post*-Booker *Sentencing*, 115 Yale L.J. Pocket Part 127 (2006), http://yalelawjournal.org/the-yale-law-journal-pocket-part/criminal-law-and-sentencing/what-yogi-berra-teaches-about-post%11booker-sentencing/ (quotation marks omitted). "Whether [judges] like that number or not, even if they are angry about that number, does not matter; they will still be influenced by that number. That is the psychological fact." Panel Discussion, *Federal Sentencing Under "Advisory" Guidelines: Observations by District Judges*, 75 Fordham L. Rev. 1, 17-18 (2006). Even Judge Posner conceded in *Demaree* that "[m]ost federal sentences

. . . continue after *Booker* to be within the guidelines' sentencing ranges." 459 F.3d at 794.

Academic research and sentencing statistics bear out these observations from the bench. One scholar recently noted that:

> [A]n empirical analysis of the Sentencing Guidelines' practical effects on sentencing in actual cases [] demonstrates . . . that **the Guidelines continue to be applied as the default benchmark for sentencing in all federal criminal cases**. . . . [A] review of post-*Booker* sentencing statistics and reversal rates throughout the federal court system presents a clear picture of the central role that the Sentencing Guidelines continue to play as the de facto arbiter of "reasonableness."

James R. Dillon, *Doubting* Demaree: *The Application of Ex Post Facto Principles to the United States Sentencing Guidelines After* United States v. Booker, 110 W. Va. L. Rev. 1033, 1089 (2008) (emphasis added).

In 2011, more than half of sentences (54.5%) in federal cases in Illinois were within the Guidelines. Only 15.6% were below the Guidelines range pursuant to a government motion, 29.1% were below the Guidelines range without a government motion, and 1.6% were above the Guidelines range. *See* U.S. Sent'g Comm'n, *Statistical Information Packet, Fiscal Year 2011, State of Illinois*, at 11, tbl. 8, available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/2011/il11.pdf.

Not only do judges sentence within the Guidelines range most of the time, but departures from the range mimic pre-*Booker* departures – the median decrease is still about twelve months.[2] *See* Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. Penn. L. Rev. 1631, 1677 & n.252 (2012) (analyzing Commission data on extent of non-government sponsored departures and variances from 2003 through 2012). Thus, the advisory Guidelines have nearly the same pull that the mandatory Guidelines had before *Booker*. As Chief Judge McKee of the Third Circuit recently testified, "[t]he average sentence length has closely tracked the guideline minimum for a long period of time." Theodore McKee, Chief U.S. Circuit Judge, U.S. Court of Appeals for the Third Circuit, Statement Before the U.S. Sentencing Commission 19 (Feb. 16, 2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_McKee.pdf. Indeed, as illustrated in the Figure at App. 1, the average sentence imposed since 2007 has been approximately ten months below the average Guidelines minimum. The Guidelines anchor sentencing decisions even when the ultimate sentence departs from the Guidelines.

Therefore, according to the statistics and attested judicial practice, Illinois defendants face much more than "a significant risk" of increased punishment

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[2] The Commission does not provide data regarding the extent of variances and departures for individual districts.

when the Guidelines range in effect at sentencing has increased the recommended punishment above the range in place at the time of the offense. *Garner*, 529 U.S. at 255. Because district courts sentence within the Guidelines range more than half the time and vary from the range only moderately, Illinois defendants caught in the *Demaree* bind are almost guaranteed to receive an increased punishment. The Ex Post Facto Clause does not permit this result.

II. The Current Seventh Circuit Approach to Sentencing Causes Disparities Based Solely on a Defendant's Geographical Location.

A. A purpose of the Guidelines is to avoid unwarranted sentencing disparity.

When this Court severed and excised those provisions of the Sentencing Reform Act that made the Guidelines mandatory to remedy the Sixth Amendment problem, it noted that the advisory Guidelines system would "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *United States v. Booker*, 543 U.S. 220, 264-65 (2005). This Court has held that district courts must "consider the need to avoid **unwarranted disparities** – along with other § 3553(a) factors – when imposing sentences," and in doing so, must "take account of sentencing practices in other courts. . . . [T]hese

disparities must be weighed against the other § 3553(a) factors and any unwarranted disparity created by [the Guidelines range] itself." *Kimbrough*, 552 U.S. at 108 (emphasis added).

Thus, while lockstep uniformity in sentences among individual defendants or among districts is no longer the goal of the sentencing system, avoiding **unwarranted** disparities remains an important goal even post-*Booker*. As the Sentencing Commission has described it, "[u]nwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing." U.S. Sent'g Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 113 (2004) (emphasis in original). When a sentencing disparity is not relevant to or justified by differences among the circumstances of the offense, the characteristics of the defendant, or the purposes of sentencing, the disparity is unwarranted.

B. *Demaree* causes unwarranted harsher sentences for Illinois' defendants.

Defendants in the Seventh Circuit are sentenced differently on the basis of their geographical location alone – a disparity irrelevant to the circumstances of

the offense or the characteristics of the defendant. In *Demaree*, the Seventh Circuit held that the Ex Post Facto Clause applies "only to laws and regulations that bind rather than advise" and therefore that the clause does not apply to the Guidelines now that they are advisory. 459 F.3d at 795. So the Seventh Circuit, unlike other circuits, permits district courts to calculate the Guidelines range based on a more severe version of the Guidelines than was in effect at the time of the offense. The district courts within the Seventh Circuit then use that higher range as the still-required starting point and initial benchmark. This practice creates a geographic disparity in the applicable Guidelines range itself. *Kimbrough*, 552 U.S. at 108.

Demaree's impact is not isolated. A review of electronically published case law shows that district courts have cited *Demaree* more than 60 times since 2006. And the effect of *Demaree* is likely broader. Nearly 10,000 Illinois defendants were sentenced under the Guidelines between 2006 and 2011. *See* U.S. Sent'g Comm'n, Interactive Sourcebook, Circuit and District Statistics, Table 2 (Guideline Offenders in Each Circuit and District), http://isb.ussc.gov/USSC?userid=USSC_Guest&password=USSC_Guest. Many of these sentences will not show up in electronic reporters. Meanwhile, the U.S. Sentencing Commission has issued more than 700 amendments to the Guidelines since they took effect in 1987, and the Commission routinely amends the Guidelines in a manner that increases Guidelines ranges. *See* U.S. Sent'g Comm'n, 2011 Federal Sentencing Guidelines

Manual, Appendix C, vols. I-III, available at http://www.ussc.gov/Guidelines/2011_Guidelines/index.cfm.

The *Demaree* disparity is therefore both real and far-reaching, as illustrated by Mr. Peugh's sentencing. Under the 1998 Guidelines in effect at the time Mr. Peugh committed his crime, his Guidelines range was 37 to 46 months. *See* Brief of Marvin Peugh, Petitioner, *United States v. Peugh*, No. 12-62, at 5 (Sup. Ct. July 2012). Mr. Peugh was sentenced under the 2009 Guidelines, under which an amendment to the fraud guideline subjected him to a range of 70-87 months for the same crime – roughly twice the length of time contemplated under the 1998 Guidelines. *Id.* at 6. *See also United States v. Butera*, Nos. 09 C 5305, 06 CR 613-1, 2009 WL 3561588, at *2 (N.D. Ill. Oct. 30, 2009) ("Application of the guidelines manual in effect at the time of sentencing rather than the one in force at the time of the defendant's crime does not violate the Ex Post Facto Clause, even if the later manual suggests a harsher sentence.") (citing *Demaree*, 459 F.3d at 795); *United States v. Groos*, No. 06 CR 420, 2008 WL 5387852, at *3 n.2 (N.D. Ill. Dec. 16, 2008) ("[*Demaree* held] that changes to Sentencing Guidelines can apply retroactively without running afoul of the *ex post facto* clause because the guidelines are advisory, not binding[ ].") (citation omitted).

As another example, in April 2012 the Commission issued an amendment to the insider trading guideline, raising the base offense level for that crime from 8 to 14. *Compare* U.S. Sent'g Comm'n, 2011

Guidelines Manual, § 2B1.4, *with* U.S. Sent'g Comm'n, Amendments to the Sentencing Guidelines, at 2 (April 30, 2012) (unofficial text), available at http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20120430_RF_Amendments.pdf.[3] Under this amendment, assuming a criminal history category of I and a gain of $5,500, a defendant sentenced under the insider trading guideline would go from a range of 6-12 months in a zone not requiring a term of imprisonment to a range of 21-27 months in a zone requiring straight imprisonment. *See* U.S. Sent'g Comm'n, 2011 Federal Sentencing Guidelines Manual, § 5C1.1(c), (f); *id.*, ch. 5, pt. A, Sentencing Table, available at http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_HTML/5a_SenTab.htm. Therefore, under *Demaree*, an Illinois defendant convicted of insider trading

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[3] Several other 2012 amendments also increase sentencing ranges for existing crimes. For example, the Commission amended § 3A1.5 to include an upward adjustment for defendants convicted of a serious human rights offense and § 2L2.2 to include a 2-level increase in the base offense level for defendants convicted of immigration fraud related to a serious human rights offense. *See* U.S. Sent'g Comm'n, 2012 Amendments to the Sentencing Guidelines, at 30-31. The Commission amended § 4A1.2, Application Note 5, to clarify that prior convictions for driving while intoxicated and similar offenses are always counted towards a defendant's criminal history score, regardless of whether the offenses are classified as felonies, misdemeanors, or petty offenses. *See id.* at 35. And the Commission amended the Commentary to § 5G1.2 (Sentencing on Multiple Counts of Conviction) to clarify that when any count involves a mandatory minimum that restricts the defendant's Guidelines range, the guideline range is restricted as to all counts, not just the count involving the mandatory minimum. *Id.* at 38.

that took place prior to this amendment but who is sentenced after this amendment takes effect would almost certainly be sentenced to a year or more in prison. Yet defendants convicted of the exact same crime and sentenced at the same time outside the Seventh Circuit would likely avoid prison altogether. The only reason for the difference is the geography of the defendants. In short, *Demaree* creates unwarranted disparity among sentences to the unique detriment of Illinois defendants and others sentenced within the Seventh Circuit.

CONCLUSION

For the foregoing reasons, amicus curiae urges the Court to grant Mr. Peugh's petition for a writ of certiorari and to reverse the decision of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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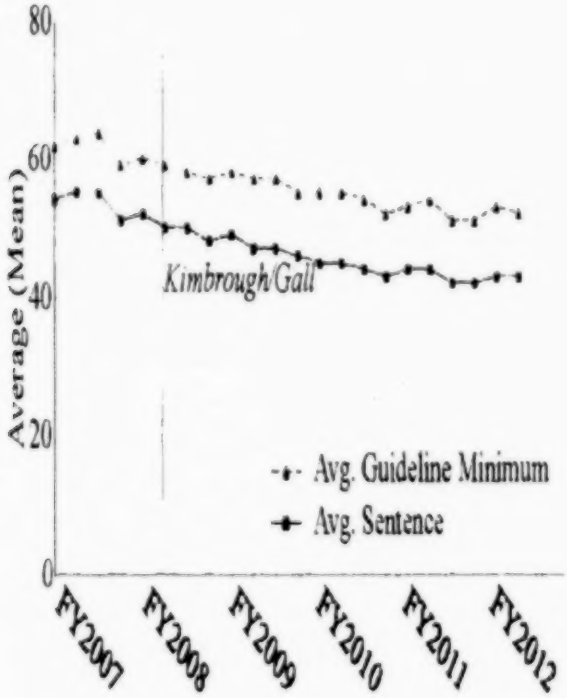
Dated: August 16, 2012

AVERAGE SENTENCE LENGTH AND AVERAGE GUIDELINE MINIMUM QUARTERLY DATA FOR ALL CASES[1]

Fiscal Years 2007-2011, 1st Quarter 2012 Preliminary Cumulative Data (October 1, 2011, through December 31, 2011)



[1] Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this table includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties. Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2007-2011 Datafiles, USSCFY07-USSCFY11, and Preliminary Data from USSCFY12 (October 1, 2011, through December 31, 2011). Figure originally printed in U.S. Sent'g Comm'n, Preliminary Quarterly Data Report 32 (2012).

JOINT APPENDIX

Supreme Court, U.S.
FILED
DEC 26 2012
OFFICE OF THE CLERK

No. 12-62

IN THE

Supreme Court of the United States

MARVIN PEUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX
VOLUME I

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PETITION FOR A WRIT OF CERTIORARI FILED: JULY 16, 2012
CERTIORARI GRANTED: NOVEMBER 9, 2012

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 10-2184

UNITED STATES OF AMERICA,

vs.

MARVIN PEUGH,

Docketed: May 13, 2010

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
5/13/2010	1	Criminal case docketed. Fee paid. Docketing Statement due for Appellant Marvin Peugh by 05/19/2010. Appellant's brief due on or before 06/22/2010 for Marvin Peugh. Transcript information sheet due by 05/27/2010. [1] [10-2184] (SM)
5/27/2010	2	Docketing statement filed by Appellant Marvin Peugh [6224397][2]

DATE	DOCKET NUMBER	PROCEEDINGS
		[10-2184] (MAN)
5/27/2010	3	Disclosure Statement filed by Attorney Peter B. Nolte for Appellant Marvin Peugh. [3] [10-2184] (AD)
06/01/2010	4	Attorney Daniel J. Cain for Marvin Peugh in 10-2184 terminated and added Attorney(s) Peter Nolte for party(s) Appellant Marvin Peugh, in case 10-2184 per disclosure statement. Disclosure statement filed by Attorney(s) Peter Nolte for party(s) Appellant Marvin Peugh, in case 10-2184. [10-2184] (CD)
06/07/2010	5	Filed Seventh Circuit Transcript Information Sheet by Appellant Marvin Peugh. [6226555][5] [10-2184] (SM)
06/10/2010	6	Motion filed by Appellant Marvin Peugh for release pending appeal. [6] [10-2184] (FP)
06/10/2010	7	Filed Appellant Marvin Peugh Memorandum in

DATE	DOCKET NUMBER	PROCEEDINGS
		support of motion for release pending appeal. [6] [6227726] [7] [10-2184] (FP)
06/17/2010	8	Order issued DENYING motion for release pending appeal. [6] WLK [8] [10-2184] (ER)
06/21/2010	9	Motion filed by Appellant Marvin Peugh to extend time to file appellant's brief. [9] [10-2184] (CD)
06/21/2010	11	Court reporter motion to extend time to file transcript filed by Court Reporter Mary Lindbloom. [6230228] [10-2184] (CD)
06/21/2010	13	Attorney Peter Nolte for Marvin Peugh in 10-2184 terminated and added Attorney Nick Zimmerman for Appellant Marvin Peugh, in case 10-2184 per disclosure statement. Disclosure statement filed by Attorney Nick Zimmerman for Appellant Marvin Peugh, in case 10-2184. [13] [6230365] [10-

DATE	DOCKET NUMBER	PROCEEDINGS
		2184] (JLC)
06/22/2010	10	Order issued GRANTING motion to extend time to file appellant's brief. [9] Appellant's brief due on or before 09/02/2010 for Marvin Peugh. Appellee's brief due on or before 10/04/2010 for United States of America. Appellant's reply brief, if any, is due on or before 10/18/2010 for Appellant Marvin Peugh. CMD [10] [10-2184] (AM)
06/22/2010	12	Order issued GRANTING motion to extend time to file transcript. [11] Transcript due by 08/02/2010. CMD [12] [10-2184] (AM)
07/16/2010	14	Court reporter motion to extend time to file transcript filed by Court Reporter Mary Lindbloom. [6236579] [10-2184] (AD)
07/19/2010	15	Order issued GRANTING motion to extend time to file transcript. [14]

DATE	DOCKET NUMBER	PROCEEDINGS
		Transcript due by 08/30/2010. CMD [15] [6236723] [10-2184] (SM)
07/28/2010	16	Motion filed by Appellant Marvin Peugh to extend time to file appellant's brief. [6239665] [10-2184] (CD)
07/29/2010	17	Order issued GRANTING motion to extend time to file appellant's brief only to the extent that briefing shall proceed as follows: [16] Appellant's brief due on or before 10/12/2010 for Marvin Peugh. Appellee's brief due on or before 11/12/2010 for United States of America. Appellant's reply brief, if any, is due on or before 11/29/2010 for Appellant Marvin Peugh. CMD [17] [6239727] [10-2184]--[Edited 07/29/2010 by KL] (KL)
09/30/2010	18	Motion filed by Appellant Marvin Peugh to extend time to file appellant's brief. [6255840] [10-2184]

DATE	DOCKET NUMBER	PROCEEDINGS
		(JR)
10/04/2010	19	Order issued GRANTING motion to extend time to file appellant's brief. [18] Appellant's brief due on or before 12/13/2010 for Marvin Peugh. Appellee's brief due on or before 01/12/2011 for United States of America. Appellant's reply brief, if any, is due on or before 01/26/2011 for Appellant Marvin Peugh. No further extensions of time will be allowed, except in extraordinary circumstances. CMD [19] [6256040] [10-2184] (FP)
11/18/2010	20	Motion filed by Appellant Marvin Peugh with supporting exhibit for substitution of appellate counsel. [6267201] [10-2184] (AD)

DATE	DOCKET NUMBER	PROCEEDINGS
11/22/2010	21	Order issued GRANTING Motion, with Supporting Exhibit, for Substitution of Appellate Counsel for Defendant, Marvin Peugh. attorney Allan A. Ackerman is SUBSTITUTED as retained counsel for defendant-appellant Peugh in this appeal in place of attorney Nick Zimmerman and the law firm of Sreenan & Cain, P.C. Further, the briefing schedule set on October 4, 2010, remains in effect. [20] DW [21] [6267366] [10-2184] (AD)
12/07/2010	22	Motion filed by Appellant Marvin Peugh to extend time to file appellant's brief. [6271113] [10-2184] (AD)

DATE	DOCKET NUMBER	PROCEEDINGS
12/09/2010	23	Order issued GRANTING motion to extend time to file appellant's brief. [22] Appellant's brief due on or before 01/21/2011 for Marvin Peugh. Appellee's brief due on or before 02/22/2011 for United States of America. Appellant's reply brief, if any, is due on or before 03/08/2011 for Appellant Marvin Peugh. CMD [23] [6271367] [10-2184] (AD)
01/18/2011	24	Motion filed by Appellant Marvin Peugh to extend time to file appellant's brief. [6280185] [10-2184] (AM)

DATE	DOCKET NUMBER	PROCEEDINGS
01/19/2011	25	Order issued GRANTING motion to extend time to file appellant's brief. [24] Appellant's brief due on or before 03/07/2011 for Marvin Peugh. Appellee's brief due on or before 04/06/2011 for United States of America. Appellant's reply brief, if any, is due on or before 04/20/2011 for Appellant Marvin Peugh. CMD [25] [6280445] [10-2184] (AM)
03/02/2011	26	Motion filed by Appellant Marvin Peugh to extend time to file appellant's brief. [6290608] [10-2184] (KL)

DATE	DOCKET NUMBER	PROCEEDINGS
03/03/2011	27	Order issued GRANTING motion to extend time to file appellant's brief. [26] Appellant's brief due on or before 04/12/2011 for Marvin Peugh. Appellee's brief due on or before 05/12/2011 for United States of America. Appellant's reply brief, if any, is due on or before 05/26/2011 for Appellant Marvin Peugh. CMD [27] [6290790] [10-2184] (AD)
03/31/2011	28	Motion filed by Appellant Marvin Peugh to extend time to file appellant's brief. [6297858] [10-2184] (FP)
03/31/2011	29	Motion filed by Appellant Marvin Peugh to file oversize brief. [6297863] [10-2184] (KL)

DATE	DOCKET NUMBER	PROCEEDINGS
04/06/2011	30	Order re: 1) Defendant-appellant's Unopposed Motion for Leave to File Oversized Opening Brief. 2) Verified Unopposed Motion, to Enlarge the Time for Filing for the Appellant's Opening Brief and Required Short Appendices, to and Including April 22, 2011. #1 and #2 are GRANTED. Appellant may file an opening brief containing up to, but no more than, 15,500 words. Briefing shall proceed as follows: [29] [28] Appellant's brief due on or before 04/22/2011 for Marvin Peugh. Appellee's brief due on or before 05/31/2011 for United States of America. Appellant's reply brief, if any, is due on or before 06/06/2011 for Appellant Marvin Peugh. AIN [30] [6299191] [10-2184]--[Edited 04/07/2011 by AD to correct typo in text and on order.] (AD)

DATE	DOCKET NUMBER	PROCEEDINGS
04/21/2011	31	15 copies Appellant's brief filed by Appellant Marvin Peugh. [6302884] [31] Disk filed. [31] [6302884] [10-2184]--[Edited 04/26/2011 by CO] (CO)
05/13/2011	32	Motion filed by Appellee USA to extend time to file appellee brief. [6308176] [10-2184] (Love, Michael)
05/13/2011	33	Order issued GRANTING motion to extend time to file appellee's brief. [32] Appellee's brief due on or before 07/07/2011 for United States of America. Appellant's reply brief, if any, is due on or before 07/21/2011 for Appellant Marvin Peugh. JKL, [33] [6308281] [10-2184] (SM)
07/05/2011	34	Submitted appellee brief by Michael D. Love for Appellee USA. [34] [6320050] [10-2184] (Love, Michael)

DATE	DOCKET NUMBER	PROCEEDINGS
07/05/2011	35	Appellee's brief filed by Appellee USA. Paper copies due on 07/12/2011. [6320123] [35] Electronically Transmitted. [35] [6320123] [10-2184] (SK)
07/11/2011	36	Motion filed by Appellant Marvin Peugh to extend time to file appellant reply brief. [6321455] [10-2184] (Ackerman, Allan)
07/11/2011	37	NOTICE: Attorney Mr. Michael D. Love for Appellee USA will not be available for oral argument September 6, 2011 through September 14, 2011. [37] [6321538] [10-2184] (Love, Michael)
07/11/2011	38	Order issued GRANTING motion to extend time to file appellant's reply brief. [36] Appellant's reply brief, if any, is due on or before 08/02/2011 for Appellant Marvin Peugh. CMD [38] [6321592] [10-2184] (KH)

DATE	DOCKET NUMBER	PROCEEDINGS
08/02/2011	39	Submitted appellant reply brief by Allan A. Ackerman for Appellant Marvin Peugh. [39] [6326803] [10-2184] (Ackerman, Allan)
08/02/2011	40	Appellant's reply brief filed by Appellant Marvin Peugh. Paper copies due on 08/09/2011. Electronically Transmitted. [6326928][40] [10-2184] (CO)
08/09/2011	41	Argument set for Tuesday, September 20, 2011, at 10:00 a.m. in the Main Courtroom, Room 2721. Each side limited to 15 minutes. [41] [6328733] [10-2184] (AB)
08/29/2011	42	Received argument confirmation from Michael D. Love for Appellee USA. [42] [6333148] [10-2184] (Love, Michael)

DATE	DOCKET NUMBER	PROCEEDINGS
09/13/2011	43	Received argument confirmation from Allan A. Ackerman for Appellant Marvin Peugh. [43] [6337056] [10-2184] (Ackerman, Allan)
09/13/2011	44	Notice to the District Court to transmit the record on appeal. Record on Appeal due by 10/13/2011 [44] [6337116] [10-2184] (SK)
09/14/2011	45	Filed electronic transcript of proceedings held on 06/16/09, 06/18/09, 07/22/09, 08/14/09, 09/04/09, 11/30/09, 12/01/09, 12/01/09, 12/06/09, 12/05/08, 02/12/09, 03/20/09, 03/30/09, 04/27/10, 05/04/10, 05/28/10, 11/24/09, 11/30/09, 12/01/09, 12/02/09, 12/03/09, 12/04/09, 12/07/09, 12/08/09, 12/09/09. [45] [6337531] THIS TRANSCRIPT IS FOR INTERNAL COURT USE ONLY. Remote

DATE	DOCKET NUMBER	PROCEEDINGS
		electronic access to the transcript is ONLY available through the District Court's PACER system. [10-2184] (DP)
09/14/2011	46	Filed electronic transcript of proceedings held on 12/11/09, 12/11/09, 12/14/09, 12/15/09, 12/16/09, 12/17/09, 12/18/09, 12/08/09, 12/14/09. [46] [6337539] THIS TRANSCRIPT IS FOR INTERNAL COURT USE ONLY. Remote electronic access to the transcript is ONLY available through the District Court's PACER system. [10-2184] (DP)
09/16/2011	47	Original paper record on appeal filed. Contents of record : 1 vol. of pleadings; 2 vol. of loose pleadings; 1 vol. of exhibits; 2 sealed envelopes. [47] [6338109] [10-2184] (DW)

DATE	DOCKET NUMBER	PROCEEDINGS
09/19/2011	48	ORDER: This Court has received 1 envelope, document no. 136, under seal from the district court. All documents filed in this Court, except those required to be sealed by statute or rule are considered public. Pursuant to 7th Circuit Operating Procedure 10(b), documents sealed in the district court will be maintained under seal in this Court for 14 days, to afford time to request the approval required by section (a) of this operating procedure. Absent a motion from a party these sealed documents will be placed in the public record on 10/04/2011. Motion shall be filed by 10/03/2011 [48] [6338448] [10-2184] (RT)
09/20/2011	49	Case heard and taken under advisement by panel: Ilana Diamond Rovner, Circuit Judge; Diane P. Wood, Circuit

DATE	DOCKET NUMBER	PROCEEDINGS
		Judge and Ann Claire Williams, Circuit Judge. [49] [6339750] [10-2184] (SP)
09/20/2011	50	Case argued by Allan A. Ackerman for Appellant Marvin Peugh and Mr. Michael D. Love for Appellee USA. [50] [6339753] [10-2184] (SP)
11/29/2011	51	Filed Appellant Marvin Peugh Citation of Additional Authority, per Circuit Rule 28 (e). [51] [6355472] [10-2184] (Ackerman, Allan)
03/28/2012	52	Filed opinion of the court by Judge Rovner. AFFIRMED. Ilana Diamond Rovner, Circuit Judge; Diane P. Wood, Circuit Judge and Ann Claire Williams, Circuit Judge. [52] [6385079] [10-2184] (AM))
03/28/2012	53	ORDER: Final judgment filed per opinion. With costs: no. [53] [6385081]

DATE	DOCKET NUMBER	PROCEEDINGS
		[10-2184] (AM)
04/19/2012	54	Mandate issued. Entire record returned consisting of 1 vol. of pleadings; 2 vol. of loose pleadings; 1 vol. of exhibits; 2 sealed envelopes. [54] [6390936] [10-2184] (JC)
04/19/2012		FOR COURT USE ONLY: Certified copy of 03/28/2012 Final Order with Mandate sent to the District Court Clerk & U.S. Probation. [6390937-2] [6390937] [10-2184] (JC)
07/18/2012	55	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. 12-62. [55] [6413598] [10-2184] (AM)
11/13/2012	56	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. 12-62. [56] [6442402] [10-2184] (AM)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

No. 3:08-cr-50014

UNITED STATES OF AMERICA,

v.

PEUGH et al,

Date Filed: 03/18/2008
Date Terminated: 05/04/2010

DOCKET ENTRIES

DATE FILED	#	DOCKET TEXT
03/18/2008	1	INDICTMENT as to Marvin Peugh (1) count(s) 1-9, Steven Hollewell (2) count(s) 1-9 (jmm-r,) (Entered: 03/18/2008)
03/24/2009	38	SUPERSEDING INDICTMENT as to Marvin Peugh (1) count(s) 1s-9s, Steven Hollewell (2) count(s) 1s-9s (jmm-r,) (Entered: 03/24/2009)
12/18/2009	135	JURY Verdict as to Marvin Peugh (1) guilty on Count 3s-5s, 8s-9s. Marvin Peugh (1) not guilty on Count 1s-2s,6s-7s.

DATE FILED	#	DOCKET TEXT
		(RESTRICTED) (jmm-r,) (Entered: 12/18/2009)
02/08/2010	147	MOTION by USA for departure from guidelines as to Steven Hollewell (Love, Michael) (Entered: 02/08/2010)
02/11/2010		MOTION (Oral) by Steven Hollewell for additional point of acceptance of responsibility (jmm-r,) (Entered: 02/22/2010)
02/11/2010	148	MINUTE entry before the Honorable Frederick J. Kapala as to Steven Hollewell : Sentencing hearing held. United States' oral motion for additional point of acceptance of responsibility is granted. United States' motion pursuant to sentencing guideline section 5K1.1 147 is granted. Defendant's motion to depart from the guidelines to impose home confinement 78 is denied. Enter judgment in a criminal case. Defendant's bond to stand. Electronic notices. (jmm-r,) (Entered: 02/22/2010)
02/11/2010	149	JUDGMENT (Sentencing Order) as to Steven Hollewell (2), Count(s) 1-9, 1s-6s, 8s-9s, All

DATE FILED	#	DOCKET TEXT
		remaining counts are dismissed on the motion of the United States.; Count(s) 7s, The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 12 months and 1 day. The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons before 2:00 p.m. on 4/06/10. Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years. Special conditions of supervision. The defendant shall make restitution in the total amount of $2,095,270.94. Schedule of payments. Statement of reasons. Signed by the Honorable Frederick J. Kapala on 2/19/2010. (REDACTED IMAGE) Mailed notices. (jmm-r,) (Entered: 02/22/2010)
02/25/2010	150	MOTION by Marvin Peugh for extension of time *to File Objections to Presentence Investigation Report (Agreed)* (Cain, Daniel) (Entered:

DATE FILED	#	DOCKET TEXT
		02/25/2010)
02/26/2010	151	MINUTE entry before the Honorable Frederick J. Kapala as to Marvin Peugh : Before the court is defendant Peugh's motion for an extension of time to file objections to the Presentence Investigation Report (PIR) 150 . Although it appears to the court that the PIR was timely submitted in accordance with this court's order of 12-18-2009, the government has agreed to the extension and the motion is granted. Defendant is granted an additional ten days to file his objections to the PIR. The court notes that the government has 7 days to respond to defendant's objections and this schedule may result in a need to continue the sentencing hearing. Electronic notices. (jmm-r,) (Entered: 02/26/2010)
03/09/2010	152	SENTENCING MEMORANDUM as to Marvin Peugh (Attachments: # 1 Exhibit Attachment A)(Love, Michael) (Entered: 03/09/2010)

DATE FILED	#	DOCKET TEXT
03/12/2010	153	MOTION by USA to continue as to Marvin Peugh (Love, Michael) (Entered: 03/12/2010)
03/12/2010	154	MINUTE entry before the Honorable Frederick J. Kapala as to Marvin Peugh (1): United States' agreed motion to continue sentencing 153 is granted. Sentencing hearing reset from March 19, 2010 to April 27, 2010 at 9:30 a.m. electronic/mailed notice (sb,) (Entered: 03/12/2010)
03/15/2010	155	MINUTE entry before the Honorable Frederick J. Kapala as to Marvin Peugh: Objections to presentence investigation report and any motions to be filed by 4/02/10. Responses due 4/16/10. Notices mailed by Judicial staff. (jmm-r,) (Entered: 03/15/2010)
04/02/2010	156	OBJECTION to Presentence Investigation Report by Marvin Peugh (Cain, Daniel) (Entered: 04/02/2010)
04/02/2010	157	MOTION by Marvin Peugh for downward variance (Cain, Daniel) Modified on 4/5/2010 (jmm-r,). (Entered: 04/02/2010)

DATE FILED	#	DOCKET TEXT
04/15/2010	158	RESPONSE in opposition by USA as to Marvin Peugh regarding MOTION by Marvin Peugh for departure from guidelines 157 (Love, Michael) Modified on 4/16/2010 (jmm-r,). (Entered: 04/15/2010)
04/27/2010	160	MINUTE entry before the Honorable Frederick J. Kapala: Sentencing hearing held and continued to 1:30 p.m. on May 4, 2010. Supplemental briefing due April 29, 2010. Defendant's bond to stand. Notices mailed by Judicial staff. (jat,) (Entered: 04/27/2010)
04/29/2010	161	Brief by Marvin Peugh *Regarding Loss Calculations Sentencing Issues* (Cain, Daniel) (Entered: 04/29/2010)
04/29/2010	162	SENTENCING MEMORANDUM as to Marvin Peugh (Love, Michael) (Entered: 04/29/2010)
05/03/2010	163	CITATION to Discover Assets issued as to Wal-Mart, Edward Jones and First State Bank of Shannon-Polo regarding defendant Steven Hollewell (jmm-r,) Modified on 5/10/2010

DATE FILED	#	DOCKET TEXT
		(td,). (Entered: 05/04/2010)
05/04/2010	164	MINUTE entry before the Honorable Frederick J. Kapala as to Marvin Peugh : Sentencing hearing held. Defendant's motion for downward variance 157 is denied for the reasons stated in open court. Enter judgment in a criminal case. Defendant's bond to stand. Electronic notices. (jmm-r,) (Entered: 05/12/2010)
05/04/2010	165	JUDGMENT (Sentencing Order) as to Marvin Peugh (1), Counts 1-9 of the Original Indictment are dismissed.; Count(s) 1s-2s, 6s-7s, The defendant has been found not guilty on counts 1, 2, 6 & 7 of the superseding indictment.; Count(s) 3s-5s, 8s-9s, The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 70 months on counts 3, 4, 5, 8 & 9 of the superseding indictment to run concurrently. The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons before 2:00 p.m. on 7/12/10. Upon release from

DATE FILED	#	DOCKET TEXT
		imprisonment, the defendant shall be on supervised release for a term of 3 years on counts 3, 4, 5, 8 & 9 of the superseding indictment to run concurrently. Special conditions of supervision. The defendant shall make restitution in the amount of $1,967,055.30. Schedule of payments. Statement of reasons. Signed by the Honorable Frederick J. Kapala on 5/11/10. (REDACTED IMAGE) Mailed notices. (jmm-r,) (Entered: 05/12/2010)

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARVIN PEUGH,

Defendant.

Docket No. 08 CR 50014

Rockford, Illinois
Tuesday, May 4, 2010
1:30 o'clock p.m.

VOLUME 2
TRANSCRIPT OF PROCEEDINGS
(Sentencing Hearing)

BEFORE THE HONORABLE
FREDERICK J. KAPALA

APPEARANCES:

For the Government:
HON. PATRICK J. FITZGERALD
United States Attorney
(308 West State Street,
Rockford, IL 61101) by
MR. MICHAEL D. LOVE
Assistant U.S. Attorney

For the Defendant:
SREENAN & CAIN
(321 West State Street,
Suite 803,
Rockford, IL 61101) by

MR. DANIEL J. CAIN
MR. CHRISTOPHER A. DE RANGO

Also Present:
MR. BRUCE BUHR
Special Agent, FBI

MS. JENNIFER TABORSKI
Probation Office

Court Reporter:
Mary T. Lindbloom
211 South Court Street
Rockford, Illinois 61101
(815) 987-4486

THE CLERK: 08 CR 50014-1, U.S.A. v. Marvin Peugh.

MR. LOVE: Good afternoon, your Honor. Mike Love on behalf of the United States.

MR. CAIN: Good afternoon, your Honor. Dan Cain, Chris DeRango, and Laurie Story here with Marvin Peugh here before you this afternoon.

THE COURT: The case comes before the court for a continued sentencing hearing. In addition to the materials that I've already mentioned, I have considered the defendant's brief regarding loss calculation issues and the government's supplemental sentencing memorandum. I'm a little afraid to ask, but do the parties have anything else?

MR. LOVE: No, your Honor.

MR. CAIN: No, sir.

THE COURT: All right. Well, why don't you have a seat and let me go through the calculation analysis that I have.

The defendant raises several objections to the guidelines calculations as stated in the presentence investigation report, including arguing that the 1999 version of the guidelines manual should be used in this case to avoid an ex post facto violation, that the PSR improperly included as relevant conduct the loss amount from the loans obtained by the defendant prior to June 2000, even though he was found not guilty of those charges, and that the amount of loss calculations are incorrect for both the bank fraud count and the check kiting counts.

First defendant argues that the application of the 1999 guidelines manual would have resulted in a much lower total offense level than is calculated under the current manual, and, therefore, using the 2009 guidelines manual, quote, imposes a significant risk of enhanced punishment and is violative of the ex post facto clause of the Constitution. The defendant recognizes that the Seventh Circuit decision in United States v. Demaree, which held that a post-offense change in an advisory guidelines range does not create an ex post facto violation, but nonetheless continues to pursue this argument. The court is bound by the holding in Demaree, and, accordingly, the court overrules the defendant's objection to the use of the 2009 guidelines manual.

Next defendant argues that the court should not consider as relevant conduct the loss amount from the bank loans referred to in Counts 1 and 2 because he was acquitted of those charges. First it should be noted that the court already has determined during the sentencing of Mr. Peugh's codefendant, Mr. Hollewell, that all three bank loans were relevant

conduct in this case. To hold otherwise now would be inconsistent with that finding.

Second and, more importantly, the fact that the jury acquitted Mr. Peugh on Counts 1 and 2 does not require the court to ignore the conduct underlying those counts when determining relevant conduct because the court determines relevant conduct based on a preponderance of the evidence standard, whereas the jury can only convict if they find guilt beyond a reasonable doubt. For this proposition, I refer the parties to United States v. Ashqar, A-s-h-q-a-r, 582 F.3d 819, noting that sentencing courts routinely rely on acquitted conduct to increase defendant's sentence.

I'd also direct the parties to United States v. Flaschberger, 408 F.3d 941, noting that an inconsistent acquittal on one count may demonstrate mercy or confusion rather than innocence.

Finally, based on the court's recollection of the evidence presented at trial, the court does find by a preponderance of the evidence that the conduct alleged in Counts 1 and 2 was part of the same scheme to obtain money from State Bank by creating fraudulent and misleading contracts for the future delivery of grain from Agri-Tech to the Grainary and then reporting those fraudulent contracts to the bank in order to secure the loans.

The same or similar defects that existed in the loan applications referenced in Count 3 and supported that conviction, that is, the inclusion of the fraudulent future delivery contracts, was present in the loan applications referenced in Counts 1 and 2, further showing that those loans were part of an ongoing scheme to defraud the bank. Accordingly,

the court finds that the loans referenced in Counts 1 and 2 are properly considered relevant conduct for purposes of the guidelines calculations pursuant to both Section 1B1.3 (a)(1) and (a) (2).

As to the loss calculation, the amounts referenced in the PSR were based on incomplete information and have since been revised. After review of the second and the fourth and the fifth supplemental report, including the attached financial impact statement from State Bank, the court finds that the amount of loss with respect to the fraudulently obtained loans is $2,067,055.30. This takes into account the remaining principal amounts of the two outstanding loans, as well as the amounts recovered by the bank for the sale of collateral and the sale of facilities, as defendant suggested in his objection.

The government has argued in this case that the amounts from the sale of the facilities should not be used to reduce the loss amount because at the time the fraud was discovered, the facilities were not collateral for the loan. In response, the defendant submitted a copy of a mortgage on the Grainary property dated August 18th, 2000, which is part of the fifth supplemental report, in order to show that the property was pledged as collateral. At the previous sentencing hearing and in its supplemental briefing, the government maintains that this was still too late because the relevant date for determining the loss amount is August 11th, 2000, the date the Grainary was shut down.

After consideration of the parties' arguments, the court finds that the government has not sustained its burden of proof, and, therefore, defendant is entitled

to a credit in the amount of $294,197.31 resulting from the sale of the facilities.

I note here that the defendant has properly abandoned his claim that instead of the amount actually recovered, the court should use the fair market value of the property, which argument was at odds with application note 3(E)(ii).

According to application note 3(E)(i) to Section 2B1.1, the time of detection of the offense is the earlier of either the time the offense was discovered by a victim or government agency or the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency. Because there is no proof that the bank fraud was actually detected on August 11th, the government attempts to argue under prong two that the defendant should have known the offense was about to be detected. The government asserts that several facts support such an inference, including the closing of the Grainary, the fact that the Bureau of Warehouses had taken control of the books and records of the Grainary, and the fact that the check kite scheme had been detected.

The court acknowledges that these facts might make it possible that the defendant should have known the bank fraud offense was about to be detected, but in my mind this conclusion is not supported by a preponderance of the evidence. The mere fact that the Grainary was closed on August 11th is insufficient to establish that the bank fraud offense was about to be detected or that the defendant knew it or reasonably should have known it.

Moreover, the fact that the bank and the defendants were willing to enter into a mortgage agreement on the Grainary property suggests the opposite conclusion, that is, that no one had detected it or was about to detect the bank fraud as of August 18th.

Finally, although the victim's own statement of loss is not necessarily controlling, the court notes that State Bank has already applied the proceeds from the sale of the facilities to reduce its loss amount.

For all these reasons, the court finds that the total loss amount should be reduced by $294,197.31, the amount recovered from the sale of the facilities pursuant to application note 3(E)(ii). The court notes, however, that this finding does not impact the guidelines calculations. After the credit, the total loss amount is $2,538,749.30, which is still over the 2.5 million threshold amount in the guidelines, resulting in an 18-level increase to the base offense level pursuant to Section 2B1.1(b)(1)(J).

Defendant also suggests that the amount of loss should be reduced by $213,361.86, which he claims is the amount of interest that was paid to the bank during the course of the fraudulently obtained loans. In support, the defendant cites several cases that stand for the general proposition that a defendant is entitled to deduct from the loss calculation any value the defendant gave to the victim at the time of the fraud.

One of the cases defendant cites is United States v. Spano, S-p-a-n-o. Defendant also cites guideline section 2B1.1, application note 3(E)(i), providing a credit against loss for the money returned and the fair market value of the property returned

and the services rendered by the defendant to the victim before the offense was detected. Although the court agrees with the general proposition, the cases cited by the defendant are not, as he concedes, directly on point with the issue at hand.

The case cited by the government in its supplemental brief, United States v. Coghill, 204 Fed. Appx. 328, although an unpublished opinion, is directly on point, and the court finds it to be persuasive. In Coghill the defendant argued that the district court had improperly included interest as a component of loss and that loss should have been calculated by subtracting all payments made on his fraudulently obtained loan directly from the amount of the principal borrowed.

The Fourth Circuit acknowledged application note 3(D)(i) to Section 2B1.1, which provides that loss shall not include interest of any kind, finance charges, late fees, penalties, amounts based on an agreed upon return or rate of return or other similar costs and held that this exclusion of interest provision serves to prevent victims from recovering all interest they could have earned had the fraud never occurred.

But the court continued. It does not follow, as Coghill suggests, that payments already made that both parties understood would be applied in part to interest due and the remainder to principal ought to instead be applied solely to principal for purposes of calculating loss. Rather the district court properly calculated loss by determining the outstanding principal balance of the loan less the amount the victims were able to recover through liquidation of the collateral provided to secure the loan.

The same scenario is at play in this case. Defendant made certain interests payments to State Bank after securing the fraudulently obtained loan. These interest payments, which the government appropriately refers to as a cost of committing the crime, certainly were necessary to keep the loan out of default, which in turn kept the fraud from being detected. As the Coghill case suggests, there is no basis now to take these interest payments and instead apply them to the principal balance of the loans.

A couple of other points are worth mentioning. First, application note 3(D)(i), which discusses, quote, interest of any kind, close quote, and other costs is under the heading exclusions from loss. Here there was no interest, finance charges, or fees of any kind included in the total loss amount. It is based entirely on the principal balances of the loan. In other words, any forward looking interest that might have been considered a loss from the bank's perspective has already been excluded from the loss calculation. Defendant is seeking an additional credit against the total loss amount for interest already paid on the loan. However, there is no similar provision for interest already paid in the credits against loss section of application note 3(E), and the court finds no basis for applying such a credit in this case.

In addition, under the former fraud guideline, Section 2F1.1, which was merged by Amendment 617 with Section 2B1.1 in 2001, there was an application note specifically dealing with fraudulently obtained loans. Application note 8(B) to former Section 2F1.1 provided in relevant part, "In fraudulent loan application cases, the loss is the actual loss to the

victim or, if a loss is not come about, the expected loss. For example, if a defendant fraudulently obtain a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered or can expect to recover from any assets pledged to secure the loan."

This application note is referenced in United States v. Lane, 323 F.3d 568. Although this particular instruction was lost from the commentary when the new section 2B1.1 was written, there does not appear to be any explanation or indication in Amendment 617 for its demise nor have any comments been promulgated which says the opposite. For all these reasons, the court finds that the total loss amount is not reduced by the amount of interest paid on the fraudulently obtained loans.

As for the loss resulting from the check kiting scheme, the PSR and supplemental report correctly identify the amount of the loss as 471,694. The defendant does not challenge this amount, but he argues that it should not be counted against him because Harlan Hollewell repaid the entire amount to Savanna State Bank shortly after it was discovered that there were insufficient funds to cover the last check. The court disagrees.

As the Seventh Circuit has stated in United States v. Mau, M-a-u, 45 F.3d 212, the time to determine the loss in a check kiting scheme is the moment the loss is detected. The court further explains that the fact that a check kiter or in this case the father and uncle of the check kiters enters into a repayment scheme after the loss has been discovered does not change the fact of the loss.

I look also to United States v. Asher, 59 F.3d 622, cited by the defendant in which the court explained, "Asher's argument that there was no loss to the bank because he promptly repaid the full amount of his overdrafts does not carry the day. Asher was caught engaging in a fraudulent check kiting scheme. The mere fortuity that he had the financial resources available to him to repay the victim bank in full after his check kiting scheme was discovered does not negate the fact that he engaged in fraudulent conduct which resulted in the loss of $160,000."

Therefore, in our case, for the purposes of the guidelines calculation, the amount of loss for the check kiting conviction shall include the $471,694, despite the fact that this amount was repaid by Harlan Hollewell. Therefore, the total loss amount in this case is $2,538,749.30, which results in an 18-level increase to the base offense level pursuant to Section 2B1.1(b)(1)(J) Because the loss was more than $2,500,000, but not more than seven million.

In its sentencing memorandum, the government objects to the PSR's failure to include a two-level enhancement for obstruction of justice pursuant to Section 3C1.1 based on defendant's perjury during trial. In United States v. Price, 516 F.3d 597, the Seventh Circuit explained that for purposes of an enhancement under Section 301.1, obstruction of justice includes perjury which occurs when a witness testifying under oath gives false testimony about a material matter with the willful intent to provide false testimony instead of as a result of confusion, mistake, or faulty memory. Also, Guideline Section 3C1.1, application note 4(B), includes committing perjury in a list of examples of the types of conduct

that qualifies for the enhancement. The government bears the burden of proving by a preponderance of the evidence that the defendant willfully provided false testimony.

Here the government argues that there are two areas of testimony by the defendant that include specific instances of perjury. This testimony concerned, one, whether Harlan Hollewell agreed to financially support the Grainary in the spring and summer of 2000, which relates to whether defendant had the intent to defraud with respect to the check kiting scheme and, two, whether Agri-Tech had the authority to enter contracts to sell grain to the Grainary on behalf of its customers, which relates to whether there were false or fraudulent statements in the materials submitted in support of the loan applications as alleged in Counts 1 through 3.

The government has included in its sentencing memorandum a detailed list of examples of these types of perjury, including reference to specific page and line numbers from the trial transcript. After a review of the cited instances and based on the court's recollection of the evidence presented at trial, as well as the court's evaluation of the manner and demeanor of the defendant while testifying and the court's assessment that the defendant lacked credibility, the court agrees that defendant gave false testimony under oath about a material matter with the willful intent to provide false testimony instead of as a result of confusion, mistake, or faulty memory, and, therefore, an enhancement for obstruction of justice based on this perjury is warranted.

First, as to the testimony concerning Harlan Hollewell's alleged financial commitment to the

Grainary, there are countless portions of defendant's testimony in which he claims that Harlan had agreed to provide whatever financing was needed and, more specifically, that he agreed to cover the checks defendant was writing that formed part of the check kiting scheme. This testimony was contradicted by the testimony of Harlan Hollewell himself, who denied making such a commitment.

Moreover, defendant's testimony with regard to covering the checks simply did not make any sense. For example, the defendant testified that on one occasion he wrote a check to the Grainary from his personal account even though he knew that he did not have sufficient funds to cover the check. Defendant's alleged expectation based upon Harlan's alleged assurances was that Harlan would then put money into the Grainary through the Hope Group, and then the Grainary would return the money to the defendant. If Harlan really had made such assurances, however, there was simply no reason for all this roundabout check writing. Harlan could have simply put the money directly into the Grainary, and defendant's personal accounts would never have been involved. The reason this simple approach was not taken is because the defendant, in my mind, testified falsely concerning Harlan's involvement and assurances.

Moreover, this testimony was material to the outcome of the trial because, if believed, it would have supported defendant's theory that he never intended to defraud the banks or cause a loss to any of the banks in the check kiting scheme. There is also no indication that this testimony was the result of mistake or confusion, as defendant repeatedly gave

the same testimony concerning Harlan's alleged assistance.

Second, the testimony concerning the authority of Agri-Tech to enter into contracts to sell grain on behalf of its customers was also false, material, and willful. Defendant testified that there were verbal agreements that allowed Agri-Tech to sell its customers' grain to the Grainary, but this was contradicted by the testimony of Steven Hollewell and Bernard Reese, the other two co-owners of Agri-Tech, who also were customers of Agri-Tech. They testified that they were responsible for marketing their own grain and that Agri-Tech was contracted only to do the farming and other fieldwork. This testimony clearly was material because it was the inclusion of the fraudulent Agri-Tech contracts on the financial statements of the Grainary that formed the basis for the scheme to defraud with respect to the loans.

Finally, there is no indication that this testimony was the result of confusion or mistake. In fact, the defendant specifically and willfully attempted to discredit the testimony of Mr. Reese by claiming that he was trying to avoid a perceived risk in order to make his testimony appear more credible to the jury.

I believe the foregoing is sufficient to establish an obstruction of justice enhancement, but I note additionally the representations made by Paul Cheeseman in his letter to the court in which he states that defendant lied to the court while under oath. During his testimony the defendant identified Mr. Cheeseman by name as a customer of Agri-Tech. In contrast, Mr. Cheeseman states that he never sold

any grain to Agri-Tech Farming and that the defendant never farmed his farm.

A review of the defendant's trial testimony showed that Mr. Cheeseman's name was referenced by defendant when talking about the Defendant's Exhibits 1025S, 1026S, 1043S, and 1052S, which purportedly were summaries of the net deliveries on various Agri-Tech contracts. If Mr. Cheeseman never sold any grain to Agri-Tech, as he asserts in his letter, then the inclusion of grain from Mr. Cheeseman as partial fulfillment of the Agri-Tech contracts referenced in those exhibits was false.

As I stated earlier, the defendant's testimony concerning the validity of the Agri-Tech contracts, including how Agri-Tech came about having grain to fulfill its contracts with the Grainary, was both willful and material to determining whether there was a scheme to defraud the bank into giving the Grainary additional loan amounts.

Based on all these reasons, the court finds that a two-level enhancement for obstruction of justice based on the defendant's perjury during trial is warranted.

Therefore, the base offense level is seven, after the application of the enhancements and reduction, the offense level is 27, the criminal history category is one, yielding an advisory guidelines imprisonment range of 70 to 87 months. I will note that I am using the sentencing guidelines manual effective November 1st, 2009.

All right. As to the other 3553(a) considerations, do the parties have any evidence? Mr. Love.

MR. LOVE: No, your Honor.

THE COURT: Mr. Cain?

MR. CAIN: Yes, sir.

THE COURT: May I have that, please?

MR. CAIN: Yes, sir. I call Reverend Russell Gordon.

I assume for the record, your Honor, that your Honor has received the approximately 96 character letters submitted on behalf of Mr. Peugh?

THE COURT: Yes, I have. I've read every one of them.

MR. CAIN: Thanks.

THE COURT: Good afternoon, sir.

(Witness duly sworn.)

THE COURT: Would you please take a seat at the witness stand?

RUSSELL GORDON, DEFENDANT'S WITNESS, SWORN DIRECT EXAMINATION

BY MR. CAIN:

Q. Sir, would you state your name for us, please, and spell your last name?

A. Russell Gordon, G-o-r-d-o-n.

Q. And how old are you, sir?

A. 68.

Q. And I understand that you are a reverend. In fact, a pastor of a particular church?

A. Yes, sir.

Q. And what church is that, please?

A. Milledgeville Brethren Church in Milledgeville, Illinois.

Q. How long have you been involved in working as a minister?

A. For 47 years.

Q. How long have you been the pastor of Brethren Church in Milledgeville?

A. It will be nine years the first of August.

Q. I understand, sir, you are married; is that right?

A. Yes, sir.

Q. Married for 47 years with children; is that correct?

A. Yes, sir.

Q. And grandchildren, as well; is that right?

A. Yes.

Q. You attended college in Ashland University in Ohio?

A. Yes, sir.

Q. That's a church-related school, sir?

A. Yes, sir.

Q. A theological seminary?

A. Yes, sir.

Q. And is it fair to say or accurate to say that you were ordained in 1965?

A. Yes, sir.

Q. Therefore, have you lived your entire life with respect to the various ministries that you've been involved in?

A. Yes.

Q. Can you tell us for the record what type of church the Brethren Church is?

A. It would be considered an evangelical church.

Q. It's a Christian evangelical church?

A. Yes.

Q. Approximately how many members are there of your church?

A. About 80 something. I'm not sure of the exact number.

Q. Okay. And briefly can you tell us what your duties are with respect to the church?

A. I'm the senior pastor and have basic responsibilities related to the spiritual welfare of people.

Q. Okay. And you have services on Sunday, and there's Sunday school, I understand?

A. Yes, sir.

Q. And you have various activities with respect to your church; is that right?

A. Yes.

Q. Sir, do you know the defendant in this case, Marvin Peugh?

A. Yes, I do.

Q. And can you tell us approximately how long you have known Marvin?

A. Just slightly over nine years.

Q. And how did you come to meet him?

A. Through the process of the church there doing what we call calling a pastor, in layman's terms hiring a pastor, and the conversation with the church that I had at that point, Marvin was serving on one of the boards that I talked with during that process.

Q. And that's one of the boards at the Brethren Church of Milledgeville?

A. Yes.

Q. So, you became acquainted with him before you actually took the position as pastor of the Brethren Church in Milledgeville?

A. Yes.

Q. And it was your understanding then that Marvin was a member -- actually a board member of that church; is that right?

A. Yes. He was on what we call the board of deacons at that time.

Q. And have you come to know him much better since that time?

A. Yes, definitely.

Q. And can you describe for us, please, how you have come to know him so much better?

A. Through the various aspects of the church, working with him on the deacon council, which along with the pastor is responsible for the spiritual condition of the church and meeting the spiritual needs of the congregation, as well as through worship experiences and other tasks with in the church.

Q. Okay. So, is it true that he has been an active member of your church ever since you have known him?

A. Definitely. And I'm aware of the fact that he was before that time, too.

Q. Okay. Are you acquainted with Mr. Peugh's family?

A. Yes.

Q. And who do you know who is family to Mr. Peugh?

A. I know his wife and their two daughters, plus his mother, as well, who comes to our church.

Q. Okay. And does Marvin regularly attend your church?

A. Yes.

Q. Is it fair to say virtually every Sunday?

A. Yes. With the minor exceptions if they're out of town on a weekend gone or on vacation, that type of thing, yes.

Q. And you indicated you know his wife Barbara, and she's here today; is that right?

A. Yes, correct.

Q. Does she regularly attend church, also?

A. Yes.

Q. You're acquainted with Marvin's children; is that right?

A. Yes.

Q. And have you known them since you have assumed that position at the church?

A. Yes. They were all members of the church and active in it before I came.

Q. And even after you came then?

A. Yes.

Q. Have they remained members and active members of your church?

A. Very definite.

Q. Can you tell me, please, what are your impressions of Marvin's children, if you will?

A. They're wonderful gals. Very well mannered and very enthusiastic in their relationship to the Lord and just all around good girls.

Q. And have you observed Marvin's relationship with his children?

A. Yes, definitely.

Q. And how is it that you've done that, and how would you describe it, please?

A. I've observed them around the church, service times, other times. I've observed them in their homes and other activities outside of the church, and it's very obvious to anyone that has been around them at all that they're a very close family and have a very deep love for each other. It's a very obvious thing that you couldn't miss.

Q. Have the children -- have Marvin's children been involved in church activities themselves?

A. Yes.

Q. How would you describe for us, please, Barbara Peugh?

A. Much like I would Marv. Very wonderful person. She's the music leader for our Sunday morning worship service. I know that through things that I have heard through our school system and students that she's appreciated as a school teacher, public school teacher, and, again, a lady that displays her desire to serve her God.

Q. And you told us you're acquainted with Marvin's mother?

A. Yes.

Q. Is she here today?

A. Yes.

Q. She's a member of your church?

A. Yes.

Q. Have you seen Marvin interact with his mother?

A. Yes, I have.

Q. And approximately how old is Marvin's mother, can you tell us?

A. In her 80s, I believe.

Q. Okay. And how would you describe Marvin's relationship with his mother?

A. That of a very caring and loving son towards his mother, very gentle with her, very concerned about her.

Q. Okay. You briefly told us that Marvin has held certain positions and duties within your church; is that right?

A. Yes.

Q. Can you more particularly describe the work that he's done with respect to those duties?

A. The major duty that I'm the most familiar with, because it's the one that he served while I've been at the church, is that of a member of the deacon council, which I have said works with the pastor in spiritual matters and meeting needs of congregation members and people outside of the church, as well.

I know that for a period of time he was the chairperson of that board, which at that time I believe had ten or twelve members on the board. He served on that board during the time that I have been there, not always as chairman, but has served on that, has worked with the board in the various aspects of the spiritual part of meeting the needs of the people in the congregation.

Q. Are there particular duties on Sunday or in the Sunday service that Marvin has been involved in?

A. Yeah. Over the years Marv has been involved in the audiovisual part of the worship service. He was very instrumental and worked with the purchase and installation of a new sound system in the church and then operated it for a number of years, and when we went to the projected images on the screens, Power Point presentations, that type of thing, he became a lead person in that work, as well.

Q. And does he perform those duties pretty much on an every Sunday basis or at least when he was in charge of the sound system or when he was in charge of the Power Point presentations?

A. Every Sunday that he was there, which was the majority of the time.

Q. Okay. You told us about the duties that he has performed and his functions in your church. How would you describe the way he's carried them out?

A. Very efficiently, very caringly.

Q. Okay. And would it be fair to say that these duties, certainly, are necessarily performed by someone who is a responsible person?

A. Definitely. They're very important.

Q. And are they time consuming?

A. It varies, but they can be at times, and other times they're not quite as time consuming.

Q. Over the years is it accurate to say that Marvin has expended many hours with regard to his duties that you've described for us in regard to your church?

A. Yes.

Q. Pastor, can you tell us, please, have you formed opinions with regard to Marvin?

A. Yes, I have.

Q. And let me ask you this before we get into maybe your direct opinions. Have you seen Marvin help people, people that you know or members of your church?

A. Yes.

Q. And can you give us some examples, if you will, with regard to the type of help he's provided to people who needed it?

A. I guess what's the most obvious to me that has impressed me as a pastor is the little things that I see him doing on a very consistent basis. When people

come in or when they come up to him or he has come across them, he seems very interested in the people. It's rather the rule than the exception to see him come up and put his arm around a person or on their shoulder and ask them how they're doing, how they feel, how things are going. That kind of caring attitude is a part of who he is.

Q. You understand that you certainly know Marvin Peugh better than the court, for example. If you were to, as best you can, describe Marvin Peugh to Judge Kapala, what would you say? How would you describe Marvin, and what type of person is he?

A. Well, to me the first thing is that as a pastor, I count him -- I am very happy to count him as a friend and a man that I have come to know. He's the kind of man that I know that if I went to him with any request that within his ability he would do his best to fulfill the request. He is the kind of person that is very caring, very concerned, very truthful in his daily actions and interactions with people.

Q. And on what basis have you formed an opinion that Marvin is a truthful man, truthful person?

A. His history that I have observed. You know, a pastor sees a lot of things, can tell less. But a pastor is able to see the way a person conducts themselves. A pastor hears what other people think. And along with it, I've observed so much about this man that underlines for me the impression that I have that he is a very truthful, honest, caring, loving person in every aspect of his life.

Q. If Marvin Peugh makes a statement to you, either under oath or not under oath, would you believe him, sir?

A. I would never hesitate to believe it.

Q. Have you ever been given any reason to doubt the statements made by Marvin or his veracity in any respect?

A. No, sir, never.

Q. Have you ever known him to be deceitful to people or to take advantage of any situation or any person since the time that you have had contact with him?

A. I never have.

Q. Pastor, you indicated that you certainly know many other people who also know Marvin Peugh; is that right?

A. Yes.

Q. And some of them are members of your church; is that correct?

A. Yes.

Q. From time to time, do you speak to members of your church and other people who you know also know Marvin? When you speak to them, does Marvin's name ever come up?

A. Yes. And more often than not, almost exclusively, it will come up at the other person's will and desire to do it. They bring it up, particularly in the last few months. People have said repeatedly, without me encouraging them or asking, they have said to me some of the basic things, same things that I have already expressed here as to my opinion about Marv. They have the same kind of opinion that I do.

Q. Do you have an opinion with regard to whether Marvin is an honest person?

A. I have no reason whatsoever to believe otherwise.

Q. Do you have an opinion with regard to whether or not he is a person who respects the law, who is a law-abiding person?

A. Yes, I believe so.

Q. Based upon your knowledge of other people in the community who know Marvin, you are, therefore, aware of his reputation in that community with regard to these various character traits; is that true, sir?

A. Yes.

Q. Can you tell Judge Kapala, please, what is Marvin Peugh's reputation in the community with respect to whether or not he is a truthful and honest person?

A. I have not been able to form any opinion other than the fact that his reputation in the community is very good.

Q. Is it very good with respect to whether he is a truthful person and an honest person?

A. Yes. I have had people tell me that they would not doubt anything that he told them.

Q. Knowing Marvin Peugh as you do, having the opinions that you have of him, do you have any reason to believe that he would ever in the future violate the law in any regard?

A. Not intentionally.

Q. Okay. That is your opinion?

A. That's my opinion. I do not believe he's the kind of man that would intentionally with forethought break the law.

Q. And you believe that applies to the future, as well?

A. Oh, yes. Yes. I see no reason to think that he would change his life at this point.

Q. Is it your opinion that that's how he's lived his life up to this point?

A. To the best of my knowledge, yes.

Q. Reverend, is there any other thing that you'd like to tell Judge Kapala with regard to Marvin Peugh before I end this series of questions?

THE WITNESS: Your Honor, as you did, I listened to most of the testimony through the trial. And knowing Marvin the way I do, I believe in my heart that he did not intentionally set out to do the things that he has been accused of and found guilty of by the jury. I believe that his intention was always to be a law-abiding, good person. I don't know what mistakes were or weren't made, but I do not believe that his intention was to break any of the laws that he was charged with.

And I say that with reservation because I don't want to make a statement that is incorrect or dishonest on my part. When I took the oath a minute ago, it was to tell the truth, and I do that under God's scrutiny, and I sincerely believe that Marv's the kind of man that any of us in this courtroom would be privileged to count as a friend, confidante, and a coworker.

MR. CAIN: That's all the questions I have.

THE COURT: Mr. Love.

MR. LOVE: No questions.

THE COURT: Thank you very much, sir.

(Witness excused.)

MR. CAIN: Mrs. Peugh, will you come up, please?

(Brief pause.)

THE COURT: Good afternoon, Barbara.

(Witness duly sworn.)

THE COURT: Please take a seat at the witness stand.

BARBARA PEUGH, DEFENDANT'S WITNESS, SWORN DIRECT EXAMINATION

BY MR. CAIN:

Q. Your name is Barbara Peugh; is that right?

A. Yes.

Q. And I understand that you're approximately 52 years old; is that right?

A. Yes.

Q. You were born in Terre Haute, Indiana?

A. Yes.

Q. Born of parents who were involved in farming and agriculture; is that right?

A. That's correct.

Q. I understand that your parents are still alive; is that right?

A. Yes, they are.

Q. And where do they live now?

A. They live still in the family farm in Martinsville.

Q. And where is that?

A. It's about five hours south of here below Champaign.

Q. Okay. In Illinois?

A. In Illinois.

Q. And how old are your parents?

A. My dad is 87. My mom is 86.

Q. I understand that you are employed as a teacher; is that right?

A. Yes, that's correct.

Q. Where do you teach?

A. Milledgeville High School.

Q. And how long have you taught there?

A. This current round of teaching is my second round of it, and I'm in my fifth year.

Q. Okay. You're married to Marvin Peugh?

A. Yes, I am.

Q. And how long have you been married to him?

A. In July it will be 28 years.

Q. You have never before been married, correct, before that?

A. Correct.

Q. And Marvin has never been married to anyone else, either; is that correct?

A. That's correct.

Q. And you have primarily, your family, Marvin, primarily made its living in agriculture; is that right?

A. That's correct.

Q. I understand that you have two children?

A. Yes, we do.

Q. Can you tell us their names and ages?

A. Jessica is 23, and Katie is 20.

Q. And they're both here today; is that right?

A. Yes, they are.

Q. I understand Jessica is living at home with you and Marvin?

A. Yes, she is.

Q. And she wants to be a teacher. She's a substitute teacher now; is that right?

A. She is currently substitute teaching, yes.

Q. And where is Katie?

A. Katie attends Olivette Nazarene University in Bourbonnais, Illinois. She is completing her sophomore year.

Q. And, actually, that is where Jessica attended; is that right?

A. That's correct.

Q. And received her degree from there; is that true?

A. That's correct.

Q. And what type of college or university is that?

A. A private Christian university.

Q. Okay. And being a private university, if you can tell us, is there a large tuition expense?

A. Yes, there is.

Q. And did you and Marvin attempt and, in fact, help Jessica and are presently helping Katie with her tuition and expenses?

A. We helped as much as we could. They had scholarships and grants, and then to help out, we took out loans, and they also have loans.

Q. And are your loans outstanding? When I say your loans, I'm talking about you and Marvin's loans with respect to your children's education.

A. Yes, they are.

Q. And is there additional higher educational expense that Katie will necessarily expend?

A. Yes. She will need two more years.

Q. And are you and Marvin in a position to attempt to continue to help her with regard to at least a portion of her educational expense?

A. We would have to take out a loan.

Q. Okay. With regard to your daughters, how would you describe Marvin's relationship with your daughters?

A. Very close. He's been there since they were born.

Q. Okay. He's been there since they've been born. And I know this is difficult for you, but I'll ask you, please, to be more descriptive. All right?

A. He had a very active -- always active, always present. He did everything with them, for them. He

was always there. Even changed diapers, up in the middle of the night. Our daughters, especially our oldest daughter, didn't like to sleep by herself, and he would oftentimes forego sleep to go in and either lay down on the floor so she would see him there, look over her crib, chase down pacifiers. He's been there throughout everything. They've always been close. He read to them, took them with him wherever he could. We've been very blessed. I teach high school, and I could only -- we only dream that the children would have such a father.

Q. I asked the pastor what types of kids you had, and he seemed to think highly of them. Have they ever been in trouble in any regard?

A. No.

Q. How would you describe your children?

A. We're very proud of them. They made the choice to attend a Christian university. They chose paths that we hoped they would with their friends. They've made the best choices, and they've talked about it with us. When they made the choice whether to drink or not, they didn't. We don't. And it's just that we're close with them, and we try to teach them Christian ways, and we were just very blessed and fortunate that they were very close to us and many times choose to be with us. They want to go places when we go somewhere. And even if it's just to the farm to help Marv go get equipment, usually they'll be right there with me.

Q. I note or I see that Katie, she attends school away from home; is that right?

A. Yes, that's correct.

Q. How often -- to your knowledge, how often is Marv in touch with Katie?

A. Probably every day. He calls her, and if he hasn't heard from her, that's the first thing he asks me when I get home from school. "Did you hear from Katie?" And so, we'll call. And they both have a lot of conversations with him while he's farming the tractor. A lot of encouragement was given both girls because I'm busy at school, and so they could always call dad.

Q. Do yourself and Marvin take the girls to church?

A. Yes.

Q. And was that on a regular basis?

A. Yes, ever since they were born.

Q. And were the kids encouraged to be participants in the church, as well as Sunday members, but actively involved?

A. Yes, they were. If there was something they could do or someone asked them to do it, they would do it.

Q. And did you and Marvin during the time period when your girls were younger, you talked to them about Christian principles and the Bible and such things?

A. Yes. Yes, we did.

Q. Do you believe that Marvin has been -- well, let me ask you this. What's your opinion with regard to whether or not Marvin has been a good father to those girls?

A. There's absolutely no question. He's a fabulous father. He cares about those girls. He would do anything for them, give them anything. He sacrifices for them. There's just no end to what he would do for those girls.

Q. Marvin's mother is here today; is that right?

A. Yes, that's correct.

Q. How old is Marvin's mother?

A. I think 85.

Q. Okay. And where does Marvin's mother reside?

A. In Milledgeville.

Q. And where in Milledgeville?

A. She resides in her own home with the assistance of Marv.

Q. Okay. And without getting real graphic, I guess, here, does Mrs. Peugh need some assistance?

A. Yes, she does.

Q. At that age?

A. Yes.

Q. What type of assistance, generally?

A. She no longer drives. So, she needs to be taken to the grocery store. We help her get her medicines. Marv goes with her to the doctor's office, makes sure that he talks to the doctor about her medications, talks to the doctor about what she needs, her upcoming appointments. He helps her run errands, goes to the post office for her, checks in on her daily. And if the need arises, which it did last winter, he

went over and prepared her meals for her because she wasn't able to do it herself.

Q. Okay. And how often does Marvin see his mother?

A. Probably close to every day. It depends on what he's doing that day.

Q. Okay. And it's your opinion that she is somewhat dependent upon that assistance?

A. Yes, I would say so.

Q. What type of -- well, I presume then that you have an opinion with regard to Marvin's relationship with his mother and the way he treats her; is that right?

A. Yes.

Q. And how would you qualify it, I guess?

A. He treats her very lovingly. He speaks to her very lovingly, very respectfully. If he thinks that she needs something, he will ask her about it, and he makes sure that she gets whatever she needs.

Q. How often do you see your parents?

A. We try to go down and visit them every chance we get. We're very close with our parents, with my parents. Probably once a month or every two months. Depends on farming season, depends on how busy the girls were.

Q. Is your father still involved in farming?

A. Yes, he is.

Q. And when you go to see your parents, does Marvin go along with you?

A. Yes, he does.

Q. And what type of relationship does he have with your parents?

A. They love him like a son.

Q. And have you noticed any assistance that Marvin has given to your parents over the years?

A. Yes.

Q. Can you tell us about that?

A. Yes. He goes out, helps with the equipment. If dad is running equipment in the field, he'll offer to help, follow along, even just keep him company. They love to talk, talk about crops, and if something needs fixing, Marv helps him out with it, whatever he can do. He just is right there with him and my brother.

Q. Have you seen Marvin help other people besides the persons that we have now discussed?

A. Yes, I have.

Q. And can you tell us about that, please?

A. He will always help in any way he can. He helps friends with carpenter work projects, heavy lifting if someone is moving. My daughter worked for a lady down the street, elderly lady, and when it came time for her to move, she really didn't have people to help. So, Marv just took out a whole day and helped her move everything over, helped her get it unpacked, even transported her cats for her.

Anybody that needs help of any kind -- there was a family that was in a bad accident, a farm family, and he went out there to see if he could do anything, and, as a matter of fact, the farm wife was doing chores, and this was several years ago, and she still

talks about that every single time that I see her, that there was Marv, and he was offering to help her do chores, and she was about to the end because she was trying to do them alone. Her family was in the hospital.

Q. What type of husband has he been to you?

A. He's just extremely loving. I could not ask for a more attentive, gentle, helpful, loving. He always sees what I need before himself. He sacrifices his needs for mine. And because I teach home economics, I do a lot of the grocery shopping for the classes, and he helps me carry in groceries clear up to my room, which is several stairs.

Every job, every duty that I've had, he's offered to be right there with me, from school functions to church obligations to friends. Anything that's ever needed, and my family, he is right there. He will always, always offer to help.

Q. You have served on various committees or performed other activities with regard to the church with Marvin?

A. Yes.

Q. How would you describe the way he's devoted himself to your church?

A. I would say much in the same way to me. He has tried to do what he can, use his talents. If he saw something that needed to be done, needed to be fixed, corrected, he would try to go about figuring out a way to get it done.

He does our audio and visual, as much as he can. Since he lost half of his hearing, he hasn't done as much sound, but certainly with the visual aspects of

it, he tries to help any member in need or any physical things around the church that need help.

Q. Does Marvin drink?

A. No.

Q. Does he smoke?

A. No.

Q. Does he gamble?

A. No.

Q. Does he have the type of habits that cause the family money to be spent, maybe frivolously spent in any regard?

A. Never. As a matter of fact, when the girls leave for college, he opens his wallet. He doesn't carry much cash, but he always gives them whatever he has in it, and it's usually you know, could just be a couple dollars, but he'll always give it to them in case they need it.

Q. Does he spend money on himself?

A. He never does.

Q. Does he wear fancy clothes in any regard?

A. No. The only ones we insist that he -- that we get for him, and a lot of times it's as gifts that we think he should have.

Q. And does he drive fancy cars?

A. No. As a matter of fact, he is very frugal, and usually it's something with a lot of miles on it, and he's usually fixing on it because the money needs to be spent maybe paying operating loans or something, and he doesn't believe in doing that.

Q. How would you describe Marvin's work ethic?

A. He is a very hard worker. I've often told my parents that he reminds me of an aunt that we used to have that just went out, just worked at stuff. Like we always said the expression like she was killing snakes, and I said I've married one. He is absolutely -- works and just doesn't stop.

He would forego lunch, unless I'm home to go out and give it to him. He works until the work is done and many times fighting against the weather or machinery that's broken down. He just does not stop. And if we're helping him, we try to help so that he can keep going because we know he likes to -- he works hard and wants the job done.

Q. And throughout the course of your marriage to him, has he been the same as you have just described?

A. Absolutely, from the very beginning.

Q. How would you say that you've made your living? I understand that you told us that you are a teacher now.

A. Yes.

Q. Marvin, as we know, has made his living primarily through agriculture, farming; is that right?

A. Yes.

Q. Who has been the breadwinner, the main breadwinner, if you might, say over the years?

A. We're probably depending on my salary for several years. For the last ten years, we have tried to gain some financial ground. He's trying to work hard

to get the farm business, pay off loans, things like that. So, we're dependent on my income.

Q. Right now you're dependent upon your income?

A. Yes.

Q. Do you and Marvin own any land of your own presently?

A. There is a small acreage. I believe it's 30 acres that we do.

Q. And do you farm then?

A. Yes.

Q. And who farms that? Is it Marvin?

A. It's Marv, yeah.

Q. Is Marvin involved in farming anyone's land other than yours?

A. Yes.

Q. Can you tell Judge Kapala about that, please?

A. We rent ground from other people, and we -- so, we are tenants on the land. So, the landlords that we've had told Marv that they would stay with him. They've been very, very loyal. Marv has been very upfront with them, very honest, and that's primarily where it comes from.

Q. And does Marvin have agreements for this season?

A. Yes, he does.

Q. To farm people's land and apparently share whatever income or profits may result?

A. Yes.

Q. Approximately how many acres?

A. Approximately 400.

Q. And let me ask you this, Mrs. Peugh. What is going to be the -- what's going to be the financial effect upon your family if Judge Kapala sends your husband to prison? What will be the effect of it?

A. It will be devastating.

Q. You're talking about financially devastating?

A. In all ways devastating. Financially. I will be the one that will be the farmer. I will have to take that over.

Q. Have you ever done that?

A. No. No, I haven't, but I will have to. We have farm operating loans, and we have contracts with landlords, and I will try to fulfill those commitments.

Q. I want you to do your best to describe to Judge Kapala who your husband is and the type of person that he is other than what you've told us. I want you to try and have Judge Kapala know your husband as best you can do right now. Can you do that for us?

A. My husband is a very consistent man. He is very loving. He thinks of others before himself. He is very gentle. He would not hurt a soul. He absolutely would not hurt anyone. He does his best to offer himself to people that are in need. He takes care of his family. We cannot have asked for a better husband and father, and we just want to be a farming family again.

It's been very difficult through the past few years, but through all of that he has remained very sincere, very honest, never wavering. It's been very difficult,

but he has taken care of us. He has never changed his character. We've tried to raise our girls to be honest, caring people, and all they have to do is watch their dad.

Q. How do you believe that Marvin's absence is going to affect you and your girls and the other people who somewhat depend upon Marvin?

A. It's going to be very hard.

Q. In describing Marvin to Judge Kapala, you said that he's kind, I think. Does he have a bad temper at all?

A. No.

Q. Have you ever seen him violent with anyone?

A. Never violent.

Q. Do you believe that he is a truthful and honest person?

A. Yes, I do.

Q. And has he been so with you during the course of your marriage?

A. Absolutely.

Q. Have the two of you ever been separated?

A. Never.

Q. Mrs. Peugh, I'm about done with my questions to you. Is there anything else that you'd like to say to Judge Kapala before we're done here?

A. I would just like to say that when I took that oath that I'm very, very, very honest when I say that Marv is very thoughtful, very sincere, very honest, and I can absolutely assure you that the man that

stands before you today is someone who his family needs, who would not ever hurt anyone.

Q. Thank you.

THE COURT: Mr. Love.

CROSS EXAMINATION

BY MR. LOVE:

Q. Ms. Peugh, just one quick question. Maybe two or three, but they'll all be on the same subject.

You indicated that your husband has contracts or leases for approximately 400 acres of farmland?

A. I would have to look that up. I'm not –

Q. That's your best guesstimate. Four hundred is your best guesstimate today; is that right?

A. Yes.

Q. About how many landlords is that?

A. Probably four.

Q. And who are they?

A. Let's see. I've got to think. I'm kind of nervous. Stanley Wagner is one. The Webster family is another one. He rents from his mother.

Q. I'm sorry. From who?

A. His mother. Ivon Miller.

Q. Ivon Miller. How many acres does he rent from his mother, do you recall?

A. You know, I could not tell you that at this time. I would have to research that.

MR. LOVE: No further questions, Judge.

MR. CAIN: I have no further questions, your Honor.

THE COURT: Thank you, Barbara.

(Witness excused.)

MR. CAIN: Your Honor, we have no additional witnesses but Mr. Peugh would address you by way of elocution at any time that you suggest.

THE COURT: I'll take that after the attorneys' arguments. I'll take the defense arguments and recommendation first.

MR. CAIN: Thank you, Judge.

I would, first of all, advise you that all the good things that you have heard here today about Marvin Peugh seem to be absolutely accurate. You have read those letters, 96 letters. I'd be willing to bet that in any case before you, you have never received that volume of letters from people, all of whom describe Marvin in the same fashion pretty much as did Mrs. Peugh and the pastor. Everyone seems to say that Marvin is a plain and simple type person who they trust, who is kind, who is helpful, who is decent, who is spiritual. That's the type of person that he is.

And that's evidenced, I think, by the fact that you have come to some degree now to know his family. You've read about them in the various reports. You know that he is a person of the land, a person who's been a farmer all his life, from farm parents. He has married one woman in his entire life. He has been devoted to her, and she's just told you. They have two children who apparently are as nice and decent and proper and hardworking, church going as any two young women can possibly be.

I think you have to consider that of all the people from the time that you have been a judge, both state court and in federal court, I would submit to you that this person by all evidence is the most gentle, decent, hardworking, kind person that you have ever had the misfortune of having to pass sentence upon.

And the fact of the matter is, I guess, that here DeRango and I are involved in this. I'd rather go and have a root canal than to stand here before you and see Marvin Peugh be sentenced for anything, to be taken from a family that needs him, from children who he has devoted himself to and who are devoted to them. They need him. His wife needs him. His mother needs him.

This is a person who has such a pristine history that he's never one time in his entire life been arrested for any one thing ever. He doesn't drink. He doesn't smoke. He doesn't gamble. He doesn't have habits that you would associate with somebody who might somehow be deceitful. He has never before been accused of being deceitful. He has helped people. He doesn't get anything from being a deacon at the church or from helping people at the church. He just does it. And here he stands before you with your findings.

Your Honor, we are aware of the statements that you made at Mr. Hollewell's sentencing, when to some degree you found or indicated that you believed that somehow Mr. Peugh got Mr. Hollewell involved in this and that Marvin was somehow more primarily responsible than Mr. Hollewell, sort of adopting what Mr. Hollewell said. With all due respect, I honestly believe that those findings aren't consistent with the evidence.

And I'm not here to argue Hollewell's sentence in any respect, but the fact is that Hollewell, Mr. Hollewell, was in charge of the books and records and the checking. And I believe that you indicated you somehow believed that Marvin somehow was primarily responsible for the NSF or the check kite situation. I honestly don't think that's borne out by the evidence.

This is the first trial I think I've ever seen where the government had to stop the case in the middle of it and ask for some time to go check with its supervisor to inform counsel and the court that their witness was not telling the truth, was lying under oath. You found basically in sentencing Mr. Hollewell that that wasn't very material to the case, the fact that he lied about a testimony in a citation to discover assets some time ago, and maybe it wasn't all that material to the case at hand, but it does show you, I think, that Mr. Hollewell said what he needed to say in his own behalf for his benefit. And I'm asking you to reconsider your thoughts relating to who was primarily responsible for these bad events.

THE COURT: Did I ever say that Hollewell was more responsible for the -- or that Mr. Peugh was more responsible for the check kiting scheme?

MR. CAIN: I thought you did, sir. I thought you did, but what I have marked here, you certainly indicated Mr. Peugh was more responsible for the - -

THE COURT: The loan fraud.

MR. CAIN: For the loss to the bank. But I thought somewhere here you indicated that you believed that Marvin was somehow more responsible

than Mr. Hollewell for the other, too. If you didn't, then I misspoke.

But I guess my point is this. Marvin Peugh has the most pristine reputation that any person really can have in the community that knows him. The other fellow came here and made his agreement with the government to testify, and whether you thought it was material or not, he lied under oath to the point where the government had to stop that. I think it's very, very noteworthy with regard to Mr. Hollewell's abilities to tell the truth when it's not to his advantage because I think the evidence shows that he has not.

Your Honor, Mr. DeRango filed the motion for downward variance, and I know you've read it. I know you've considered it, but I would like to go through a couple things. And one of the main things I'd like to say is that the change in the guidelines from 1999 to now apparently are based upon the Commission's belief that major financial crimes such as Enron and other calamitous financial crimes must be more severely dealt with than they had earlier been. I respectfully suggest to you that the case before you has nothing to do with the type of cases that have resulted in the extreme increase in the guidelines. I believe that these guidelines are overly harsh for the crime that has been committed.

I also believe, and I think it's undisputed, your Honor, that Marvin Peugh did not commit any crime for his own pecuniary benefit, greed, or that type of thing. He was convicted of one count relating to the bank, but it had nothing to do with him stealing money for some greedy purpose, for some sideline that he was involved in, for gambling or for drugs or

for alcohol or for some lifestyle that was beyond his means in some lavish fashion.

And so, I think that in this case you should give great consideration to whatever motive you ascribe to him, but the only motive that you could really ascribe to him is that he was trying to operate a business that he believed in. And I know that you have -- and the jury found on one count and you have found it by the greater weight of the evidence. I know what you found. But it certainly wasn't the act of some self-indulgent, antisocial person. He worked as hard then as Mrs. Peugh described him to work. He is a decent man now. He was a decent man then. He worked to support his family.

And I'd like to for one second talk about those contracts. Those contracts, I guess, are difficult to fathom. You have contracts entered into by the Grainary and Agri-Tech, and you say, well, we're going to use those contracts to best serve us when they can help us. And it may very well be that those types of contracts you say -- the government says they're shams, and the reason, I guess, they say they're shams is because one party's not going to enforce the contract against the other party because both of the parties either are the same or have common ownership.

But, your Honor, whether those contracts should have been entered into or not, I can't say that the evidence honestly supports the fact that they were formed with the intention to deceive the bank, although it may be that in the long run of things, the numbers inflated the Grainary's position with the bank. But I honestly am asking you not to believe

that that was the original purpose of those contracts. That's not the type of guy that Marvin Peugh is.

With regard to our request that you sentence Marvin much, much, much less than the guidelines would suggest, please take a look at his personal history. I don't think the guidelines, even in category one, come close to taking into account the summation of Marvin's life, because he's done everything right. He's done everything right up to now. It's not like he made a mistake as a juvenile. He didn't make a mistake as a young adult. He never stole anything. He was never troublesome. He graduated from high school. He went on to a couple years of college. He's done everything that you could ask your son to properly do. And besides that, then he's helped his community. He's helped his church. He's brought up two wonderful kids, who have obviously learned by the example of their parents. I don't think the guidelines take these types of things into consideration. I'm asking you to take them into consideration.

How does it benefit society to incarcerate Marvin? Do you honestly believe that he would ever be involved in any type of recidivism? Because as Mr. DeRango pointed out to you in his motion for downward variance, at the age of whatever Marvin is now, 51 years old, for a first time offender, the chances of recidivism are less than 6 percent, and that, coupled with the way that Marvin has conducted himself throughout his life, the chances of him ever breaking the law again are absolutely zero, I think you must find.

The fact that his family depends on him for not only finances, but for help in every regard, the help

that he's given to his mother who is elderly, sees her every day and does all the things that a loving son needs to do for his mother, that has been his life, and I'm asking that you restore him to that life as soon as you possibly can.

I know that in Mr. Hollewell's sentencing you went over sort of what we in state court, you know, refer to as factors in aggravation, factors in mitigation. Your Honor, not one factor in aggravation applies to Marvin Peugh. He doesn't have a violent bone in his body. He has never hurt anyone physically, certainly never intended to hurt anyone. He never has hurt anyone physically. He has been law-abiding his entire life.

I think that you should find, based upon what you've heard about him and what you've read about him in the 96 letters, that he is the type of character that shows that he would absolutely comply with any probationary period that you would require of him. I think his character and attitude is evident from the fact that he's complied with each and every term of his pretrial release and the fact that he is the most law-abiding person that's ever come before you.

This is a person who has made a mistake. He has lived his life according to Christian principles and decency. He has helped more people, probably speaking, than any other person who has ever come before you. And there's certainly no reason to believe that he would ever find himself in trouble with any court anywhere ever.

I know that you must take into account the seriousness of the offense. Bank fraud certainly can be a serious offense. But I'm asking you to take into account that when this occurred that Marvin truly

and honestly believed that the money would be forthcoming from Mr. Hollewell. You have -- I know what your statement is today, I know what your finding is today with regard to that.

But please recall that from the onset of the idea of a Grainary, it was Mr. Hollewell's -- Harlan Hollewell's idea that his son and Marvin become involved in it. It was Harlan Hollewell who put up the money for the entire purchase of it. It was Harlan Hollewell who continuously infused money into the business. When a bond had to be put up because of a glitch in something that occurred, it was Mr. Hollewell, Harlan Hollewell, who put up the money. It was Mr. Harlan Hollewell who started the Hope Group, who infused money through the Hope Group. Marvin Peugh didn't have any money. He did not have any money to invest. When he says to you that he never would have gotten involved in this except for Harlan Hollewell's assurances, I think the evidence overwhelmingly supports that.

Mr. Harlan Hollewell went to see Mr. Cross and another banker on whatever it was, June 4th, interested in -- at State Bank -- in obtaining more money to keep the Grainary afloat. He didn't borrow the money. I understand that. But he was there for that purpose. Doesn't that support what Marvin told you was his expectation of Mr. Harlan Hollewell's function with regard to this entire matter? Maybe Marvin's expectations were incorrect, but I think those were honestly his expectations. Mr. Harlan Hollewell was a wealthy man, your Honor, and I think the evidence indicates that certainly he gave assurances to Marvin, and Marvin relied on them.

I know that you have to take into consideration the fact that your sentence must promote respect for the law. Your Honor, Marvin has respected the law from the day of his birth up until, I presume, now, but certainly nobody could have shown more adherence to and respect to the law than Mr. Peugh his entire life, and he's taught that to his children.

To provide a just punishment. How long does a person who has never before been in trouble, whose motives which got him here before this court were not greed or self-indulgent, who as you, I hope, understand will never commit any crime in his life again, how much punishment is enough? Does such a person need to be incarcerated? And I guess that's for you to decide. But I submit to you respectfully that it doesn't do anyone any good to incarcerate Marvin Peugh.

You must fashion a sentence to protect the public from further crimes of the defendant. I think the chances are zero that Marvin Peugh would ever commit another crime. What you're doing is you're taking Marvin Peugh out of a community that he has helped since the time that he's been there. Not only his church, but everyone else in the community. I ask you please to consider that.

3553 says a sentence to be sufficient but not greater than necessary. Your Honor, I'm asking you not to sentence Marvin Peugh to anything certainly greater than what you have sentenced Steven Hollewell. A year and a day is a long time. If you say that these two men committed a crime together, then it seems to me that notwithstanding the fact that Marvin went to trial and the other fellow didn't, a person has an absolute right to go to trial. I think we

showed that we had a good and valid reason to go to trial, at least as evidenced by the fact that the jury acquitted Marvin of those first two counts, and I think in my mind that's certainly a rejection of the government's theory relating to ongoing deceitful conduct.

I guess in short what I'm asking you to do is to fashion a sentence so that if you send Marvin to prison, he gets home very soon so that he can retake his place in his community, in his church, with his mother, with his in-laws, with his friends and family who need him. I trust in your judgment, and I thank you.

THE COURT: Mr. Love.

MR. LOVE: Thank you, your Honor.

When we as representatives stand before the court to recommend a sentence and to talk about the reasons why we recommend a sentence, we have to make sure that justice is served to the best of our ability, and that does not mean denying or diminishing any of the positive aspects of Marvin Peugh's character or of his history. We won't do that. They are what they are. By all accounts, he has some very fine personal characteristics and a good history or an excellent history in terms of his not having committed other crimes than the ones he's here before the court to address.

Some of those qualities that were mentioned by counsel, including being gentle, being decent, being hardworking, being kind, being a good father, being a good husband, I would ask and urge the court not to put much weight on those factors. Yes, as a group, they go to attest to an overall picture of the

individual, but in terms of sentencing an individual, I think with regard to these traits we need to look for them to be neutral because, for instance, I would not come before you and say that, well, this defendant is not gentle. He's rough. And so, you must sentence him higher for being a rough person. Or that he's not a decent person. He's a mean person. Or he's not a kind person. He's a mean person. Or he's not a hardworking person. He's a lazy person. Or he's not a good father. He's just an average father.

THE COURT: But don't I have to consider the characteristics of the defendant?

MR. LOVE: I'm only talking about weight, your Honor. I'm just saying we recognize those, and defendant has argued that great weight be put on them, and I'm asking the court to look at the opposite side of that argument. I'm not denying that the court should take those into account. I expect them to be taken into account. I'm just talking about how much weight the court would put on them.

And so, the defendant has put great weight on his character in terms of asking the court to vary downward. Again, without trying to diminish the good side of his character, it's important to look at why we're here today and the perspective that places on his character. Perhaps character is best determined when the person whose character is being analyzed is given an opportunity or faces adversity. In this case Marvin Peugh was given a wonderful opportunity by his uncle, Harlan Hollewell, who loaned him the money to buy the Grainary. And right after having received that opportunity, Mr. Peugh created those sham contracts between Agri-Tech and the Grainary. So, given that

opportunity, in terms of looking at his character, Mr. Peugh is given that opportunity, and what does he do with it? He creates the sham contracts.

Next he is faced with adversity because when the sham contracts put the Grainary in a financial situation that they may not be able to come out of and they need cash flow, how does he respond to the adversity? He responds to adversity by committing a new crime, the check kite. So, in those two instances of opportunity and adversity, very close in time, Mr. Peugh chose criminal conduct.

And perhaps most telling about Mr. Peugh's character is that nine years after the opportunity and after the adversity, when he took the witness stand and testified under oath and had the greatest opportunity he had had up to that point to show his character, he didn't. In fact, as the court has found, he lied. The defendant's testimony, in my experience, your Honor, is probably as well a fabricated testimony, weaving all of the untrue points together, to come up with what would be a complete defense to the indefensible. Well fabricated.

Then we have these letters. The letters are, again, self-evident, but I would show again what it says about Mr. Peugh's character. There are a number of instances in the letters that the court has received which allude to the fact that Mr. Peugh is, in fact, some sort of victim here, a victim of the Hollewells or a victim of some unknown people, allude to his innocence, that he would not have done anything like this. I understand how people feel that way. Friend, a fellow church member. Those are natural feelings. I understand.

But the feelings have to come from somewhere, and in these letters I don't think a fair reading of them is that these people are talking about who else is responsible for Mr. Peugh's problems, except by having heard that from Mr. Peugh, which I think tells the court that in his circle of friends, he continues to maintain his innocence. He continues to tell the same lies to his friends that he told to the jury while he was on the witness stand, and that counts very negatively against his character.

Another aspect of character. Responsibility. We've heard that word used a number of times. He's a very responsible person. Well, here's the sense of responsibility he had when the Grainary closed and the bank took legal action. His sense of responsibility was to file bankruptcy, which is his statutory right, but is still his choice. So, that was how he took responsibility for the outcome of the crimes that he had committed.

Just a couple of last matters, your Honor. And I have a copy, as I know defense counsel has, of the transcript of Mr. Hollewell's sentencing. And I would direct counsel to Page 18, briefly reading some of that, and I'll give it to the court security officer so the court has access to it.

"In regard to Marvin Peugh, I feel that the defendant's criminal conduct was induced and facilitated by him," defendant meaning Mr. Hollewell. "I believe Marvin Peugh was the most dominant actor in these offenses. The defendant was manipulated by Mr. Peugh. Grain merchandising was not the defendant's primary area of responsibility, and I have concluded that the defendant participated in this check kiting scheme at the urging and direction of

Marvin Peugh." I believed those words when you said them at that time, your Honor, and I still think they're right.

And, finally, one of the reasons that was given for the defendant to not face any significant jail time was the need for restitution. I believe if the court looks carefully at the presentence report and Mr. Peugh's history in terms of creating any net worth since back in 2001 when he filed bankruptcy, as of this present time, he doesn't have any net worth to provide in the form of restitution. Having had all those years, he is still, at least primarily now, as his wife testified to, relying on her income.

So, I suggest that there is absolutely no reason to believe that Mr. Peugh is any more likely or is likely at all to provide any significant restitution if he remains out of jail. He hasn't been able to accumulate any net worth in the last ten years, and I think that indicates there's no reason that he has the likelihood that he will and be able to contribute to restitution in the future.

So, we stand by the recommendation that we made in our sentencing guideline regarding his sentencing, your Honor.

THE COURT: Marvin, you have a right to make a statement before the court. You're not required to do so. There's no obligation. Nobody is forcing you to do so. But if there is something you'd like to say that you think will help me arrive at the fairest possible sentence in this case, I'd like to hear from you.

DEFENDANT PEUGH: Your Honor, Judge Kapala, I humbly stand before you now in a daze and absolutely stunned by the events that have brought

us here. Looking back at my life and the circumstances that transpired, I am in disbelief. Hindsight is 20/20. But while that cannot help me for the events in the past, it can help my future and have an effect. I have never before in my life had events such as this occur, bank loss.

The impact this entire situation has had on my family has been nearly impossible to bear. When the events in question began to unfold, we were still just a young family with two young daughters. During this time we stayed close, perhaps growing even closer than we would have under less stressful circumstances.

My wife and daughters have relied on me for love, support, stability, and likewise I need them for these same qualities. Despite the dark shadow of these issues, my wife Barb and I did everything we could to raise the girls to be honorable, upstanding citizens. I feel that we have been successful in this endeavor, as our oldest daughter Jessica has graduated from Olivette Nazarene University with a Bachelor's degree in psychology, and our youngest, Katie, who's preparing to finish her sophomore year, also at Olivette.

We have successfully managed to instill within them the importance of truth, honesty, family, and love, as well as several other virtues that have been lost in the world today. Any member of our community, even people from across the state, could attest to the type of family we are and the values we hold. We are an incredibly close family, and I need their support and presence in my life more than anything else.

My absence would be a great tragedy, not only for me and my wife, but even more so in the lives of my daughters, who are only just beginning to live as adults. The milestones they are approaching are life-shaping, and my not being there would have an adverse effect not only for them, but also the families they will respectively begin themselves.

I desire to live my life in a fashion that is Christ-honoring and supportive to all. Much like the way I raised my own daughters, I was raised with Christian values, as well as with hard-working farm family mentality. I feel that my life has a purpose, and I intend to live in such a way that I will benefit and not harm the community in which I live.

I commit to you this day, your Honor, to God and to all I have known or will know in the future that I will live my life in a manner that is honorable. It is my greatest desire to stay with my family and humbly farm to provide for them, living well within the confines of the law.

Your Honor, I respectfully and urgently plead with you to allow me to stay with my family. I cannot accurately put into words how much I need to be near them and them near me. Experiencing the loss of my own father over 17 years ago has shown me the importance of a father's presence in adulthood, and I beg you, sir, not to cause the loss I have felt on Jessica and Katie. Judge Kapala, it is your grace and mercy that I am praying you will employ. Please allow me to stay with my family. Thank you.

THE COURT: Thank you.

I thank everyone for their efforts in helping to resolve these difficult issues. I've considered the

presentence report and accompanying materials. I've considered the arguments made by the government and the defendant. I've considered the evidence that's been presented, as well as the defendant's statement. I've considered the sentencing guideline calculations and all of the other sentencing factors contained in Section 3553(a).

The defendant has been found guilty of five counts of bank fraud. With regard to determining an appropriate sentence, the guidelines calculations have taken into account the loss amount, the fact that the defendant obstructed justice, and his lack of criminal history.

I agree with the government that Mr. Peugh is more responsible for the loan fraud. In the count involving loan fraud, the defendant took a leadership role. I hold Mr. Hollewell and Mr. Peugh equally responsible for the check kiting offenses. I think Mr. Cain was right and I can see where he could conclude that during Mr. Hollewell's sentencing I said that Mr. Peugh was more responsible. I think Mr. Love has pointed out that I said that he urged and directed Mr. Hollewell in the check kiting scheme, but as I sit here now, I think they were both equally responsible for that.

I note that the fraud perpetrated by the defendant was an elaborate scheme. This was just not one instance of bad judgment. These offenses occurred over an extended period of time. The defendant literally had years in which to reflect on what he was doing and numerous opportunities to terminate his dishonest conduct.

In mitigation, the defendant has completed his associate's degree and has held steady employment

throughout his life. He has had no prior history of arrests. The defendant's family is aware of his arrest and these offenses and remains supportive. He has the support of a great many people who have taken time away from their lives and their jobs and their activities to come here to court and demonstrate their high regard for him.

I note that this offense did not result in any physical harm to another person.

I note that the loss amount is just above the loss calculation that resulted in an offense level increase of 18. The next highest level increase is seven million.

I note, as Kevin Walsh observed, that he has endured much public scrutiny and professional discredit. He's received numerous letters of support. These letters are replete with statements describing the defendant as a kind, hardworking, sincere, generous, caring, and thoughtful person. The witnesses testifying today give the defendant high praise.

Clyde Pitts notes that the defendant is so considerate that he does not plow or plant when the wind is blowing toward Mr. Pitts' house or the clothesline. It's difficult for me to reconcile a person who is so thoughtful with the man who committed these offenses and caused literally millions of dollars in losses. In the eyes of the writers of these letters, Marvin Peugh is a good man, but sometimes people who are otherwise good commit illegal acts.

I tried as hard as I am able to make his trial as fair as possible. He had the assistance of one of the finest trial attorneys I know. Twelve people worked

very hard on this case as jurors. They considered all the evidence, and, as we know, there was quite a bit of it. They deliberated sincerely and earnestly and unanimously came to a verdict. I am sure the jury didn't treat this case lightly. In fact, they acquitted Mr. Peugh of four of the nine counts pending against him.

Some people persist in the belief that Mr. Peugh did not commit this crime or these crimes, but they did not, as the jury did, see and hear all of the evidence presented in court. I believe that he did commit these crimes. I don't think that Marvin Peugh is an evil person, but sometimes desperate situations lead people to do desperate things. Mr. Peugh broke the law, and when a person breaks the law in a small way, he pays a small price, but when a person breaks the law in a serious way, he pays a high price.

Sentencing is a very unpleasant part of my job. I dislike telling people who in other circumstances could be close acquaintances, close friends that he has to go to jail as punishment for committing a crime. I'll tell you what. I'd rather have root canal work than tell Marvin Peugh he has to go to jail, but I am charged with the duty and the obligation to impose the penalty in this case.

I recognize the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense. The sentence must afford adequate deterrence to criminal conduct. I believe there is a great and urgent need for the sentence in this case to be a general deterrence to other people that might be in a position to or consider doing these kinds of

offenses. I feel there is little need to protect the public from further crimes of the defendant.

In his motion for a downward variance, the defendant argues that a sentence below the advisory guideline range is the most appropriate sentence in this case. In support of this argument, defendant references several considerations under Section 3553(a), such as the nature and circumstances of the offense, including his motives for committing the bank fraud, the history and characteristics of the defendant, including his age and lack of criminal history, and the need to avoid unwarranted sentencing disparities.

The court has carefully considered defendant's arguments, but at the same time it is important to recognize that there are several 3553(a) considerations present in this case that do not favor a sentence below the guideline range. Therefore, the court will be mindful of all the Section 3553(a) factors while considering the defendant's arguments.

First, the defendant argues that this court should consider cases from other district courts within the circuit that have sentenced defendants to below guideline ranges in fraud cases where the defendant was motivated by something other than a desire for profit or for personal financial gain. In support of this argument, defendant cites United States v. Milne, and United States v. Ranum, which somewhat interestingly are both authored by the same judge. I note initially that as district court cases, they would only be persuasive authority, not binding precedent, but after a review of these cases, I am not convinced

that a below guideline sentence is warranted in the case.

In Milne the defendant caused a bank to suffer a loss of more than $500,000, but then he voluntarily reported his misconduct and cooperated with the bank in attempting to repay his debt, doing all this well before he was implicated in or charged with criminal activity. In addition to considering other factors, such as the character of the defendant, the court found that a reduced sentence was appropriate because the standard reduction for acceptance of responsibility did not fully account for defendant's voluntary reporting of his misconduct to the bank and his significant early efforts to ameliorate the effects of such conduct. Those same considerations are not present in this case.

While it is true that the Milne court remarked that it was relevant that the defendant did not spend the bank's money on luxury items, but rather to prop up a failing business, it is unclear how much weight the court gave this consideration, and, in any event, it is evident that it was not the primary reason for the variance.

Moreover, the court rejects defendant's suggestion that his fraud was not driven by desire for profit or for personal gain just because he did not spend the money on luxury items. The fact of the matter is that if the Grainary would have done well, the defendant would have profited by that success.

Similarly, the court finds the opinion in Ranum distinguishable from the facts of this case. In Ranum a bank loan officer exceeded his authority by making repeated loans to a company over an extended period of time. Once the company's business plan failed, it

could not repay the loan, thereby causing the bank a loss. The court noted that the defendant's culpability was mitigated in that he did not act for personal gain or for improper personal gain of another.

In this case, as I've said, the court finds that the defendant did act for personal gain, even if indirectly, by defrauding the banks into either giving his business a loan it should not have been given or by putting the banks at risk through the check kiting. Thus the court does not find that the defendant's motive for committing these offenses warrants any significant consideration in terms of mitigation.

Instead the court finds from its consideration of the nature and circumstances of the offenses that defendant committed some serious crimes with some very serious consequences. Through his actions and schemes, the defendant caused a loss of over 2.5 million to the banks that were unfortunate enough to do business with him.

Moreover, rather than owning up to his wrongdoing when the Grainary continued to fail, despite the fraudulently obtained loans, the defendant compounded his criminal activity by employing the check kiting scheme to keep the business afloat. In doing so, the defendant knowingly put various banks at risk of losing substantial amounts of money. Accordingly, on balance, the court finds that the nature and circumstances of the offense indicate the need for a strong sentence, not a more lenient one.

In a similar argument the defendant argues that the fraud guidelines rely too much on the amount of loss in determining the advisory sentencing range, that the Sentencing Commission failed to rely on

empirical data when revising these guidelines, and, therefore, that these guidelines are not entitled to any deference.

It is true that after Kimbrough a sentencing judge can have his own penal philosophy at variance with that of the Sentencing Commission, but as noted in United States v. Higdon, 531 F.3d 561, the Seventh Circuit has cautioned that as a matter of prudence and in recognition of the Commission's knowledge, experience, and staff resources, an individual judge should think long and hard before substituting his personal penal philosophy for that of the Commission.

Here the court does not disagree with the policy implicit in Section 2B1.1 of imposing increasingly stricter punishments on defendants that cause increasingly larger amounts of loss. As the background comment to Guideline Section 2B1.1 notes, ordinarily the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the loss caused or intended by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability. I am not convinced that this general policy should be disregarded in this particular case. I believe the authority defendant cites in support of his position is distinguishable from the circumstances of this case.

For example, defendant cites to a sentencing memorandum from the Southern District of New York, United States v. Adelson, again a district court decision that does not carry the weight of binding authority. In that case the defendant was a chief

operating officer and president of a publicly traded corporation who engaged in a conspiracy to materially overstate his company's financial results and thereby artificially inflating the price of its stock. After the fraud was discovered, the share price declined by 88 percent, resulting in a combined loss, according to the government, of no less than $260 million. This amount, combined with other sentencing enhancements, resulted in a suggested sentence of life imprisonment. Noting that other factors impacted the stock price, the district court rejected the government's proposed loss amount and found that the defendant's intended loss of between 50 to a hundred million was a more accurate approximation of the harm caused by the offenses.

Nevertheless, the loss amount still results in a 24-level increase that when combined with several other guidelines enhancements resulted in a recommended guideline sentence of life imprisonment, which the court in New York called an absurd guideline result that not even the government seriously defended. After commenting extensively on several Section 3553(a) factors, the judge in Adelson concluded that a sentence of three and a half years' imprisonment, coupled with a $50 million restitution amount, was the most appropriate sentence.

This case is quite different from Adelson in that it does not involve nearly the same amount of loss and certainly does not result in a, quote, absurd guideline recommendation of life imprisonment. Thus I am not persuaded that Adelson requires it to reject the policy behind Section 2B1.1 and in particular the use of loss amount as a determinative factor.

Likewise, the Bowman article that the defendant relies on discusses high profile fraud cases involving officers of public companies and cites as example the Enron case and the WorldCom case. In addition, in order to illustrate his point that the recommended sentences for these types of offenders has grown astronomically high, Bowman demonstrates the changes that have occurred over a period of time in the recommended guidelines range for a hypothetical corporate CEO convicted of securities laws violations that resulted in a loss of over 400 million. Because this article focuses on offenders at the extreme end of the guidelines loss calculation, I don't believe it is very helpful or persuasive in a case such as this where the loss amount is much smaller.

Here the loss amount exceeded 2.5 million, which resulted in an 18-level enhancement. However, when considering that the base offense level in this case is only seven and considering the particular facts of this case, the court does not disagree with the policy of imposing a stricter punishment on defendants that cause significant amounts of loss. Accordingly, the court will give the amount of loss calculations and the resulting advisory guidelines range the appropriate amount of deference in this case.

In his motion for a downward variance, the defendant also makes several arguments concerning his history and characteristics that are properly considered under Section 3553(a). For instance, the defendant argues that his age of 56 and his lack of criminal history demonstrate that a lengthy term of imprisonment is not needed for deterrence or to protect the public from further crimes of the defendant. The government does not disagree with

this assessment, but it does argue that these factors need to be considered in combination with all of the Section 3553(a) factors.

The court agrees that the defendant's age, which is not taken into account by the guidelines, and his lack of criminal history, which is accounted for by the guidelines, make it unlikely that the defendant will commit additional crimes in the future. These factors can sometimes support a variance below the guideline range. For this proposition I'll direct the parties to United States v. Carter, 538 F.3d 784, stating that a district court may properly consider a defendant's age as it relates to the possibility of him committing crimes in the future, and United States v. Middlebrook, 553 F.3d 572, noting that the district court took into account the defendant's lack of prior criminal record. But these cases do not, of course, mandate a sentence below the guideline range.

I note, for example, United States v. Alday, 542 F.3d 571, in which the district court determined that the defendant's age of 64 did not warrant a lower sentence, and United States v. Hewelt, 295 Fed. Appx. 69, noting that the district court rejected the defendant's request for a below guideline sentence based in part on his age and the fact that he had no prior criminal history.

The court has considered the defendant's age and lack of criminal history, but finds that these factors are insufficient by themselves to support a sentence below the guideline range given the other Section 3553(a) considerations, including the seriousness of the offense and the need for general deterrence, which I said I find is high in a case such as this one.

The defendant also argues that his conduct should be considered aberrant behavior in an otherwise law-abiding life. Defendant cites to the aberrant behavior departure provision in the guidelines, Section 5K1.20, but that departure obviously would not apply because the defendant did not commit, quote, a single criminal occurrence or a single criminal transaction, close quote. These offenses involved significant planning, and the offenses were not of limited duration.

Nevertheless, the defendant argues that the court should reject these requirements because the Sentencing Commission failed to fulfill its institutional role in promulgating this provision. The court finds no basis to disregard these reasonable restrictions as they merely define the parameters of what the Sentencing Commission felt was aberrant behavior.

In this case there is no question in my mind that the defendant's criminal conduct, which was drawn out over a long period of time, does not qualify as aberrant behavior. Accordingly, the court rejects defendant's request for an aberrant behavior departure or variance.

Another Section 3553(a) factor to consider is the need to provide restitution to any victims of the offense. Defendant argues that this factor warrants a sentence below the guidelines range because if he is imprisoned for an extended period of time, he will not be able to generate income from farming or maintain the leases he has for the land he rents for farming.

As Mr. Love notes, given the defendant's earning capacity and the amount of restitution, it does not appear that a variance would have a significant

impact on his ability to satisfy the restitution in this case. Also, it is true that in any case where imprisonment is ordered along with restitution, the imprisonment will make restitution more difficult to pay. In any event, under the facts and circumstances of this case, the court does not deem the ability to pay restitution as a significant factor to support a variance.

Finally, defendant argues that based on the need to avoid unwarranted sentencing disparities, he should be given a sentence consistent with the sentence imposed on Steven Hollewell. I disagree with that proposition and find that any resulting sentencing disparities are wholly warranted in this case. Mr. Hollewell pled guilty before trial. He showed a willingness to assume responsibility for his conduct, acknowledged his culpability, and assured the swift application of correctional measures to him. He did not obstruct justice by committing perjury during trial. These facts alone constitute a five-level difference in the total offense level calculation under the sentencing guidelines.

In addition to that, Mr. Hollewell also helped with the government's investigation and testified against the defendant at trial, thereby providing substantial assistance to the government. This resulted in a substantial downward departure pursuant to Section 5K1.1, further demonstrating that a difference in sentences among these codefendants is warranted.

Finally, the court recognized at the sentencing hearing for Mr. Hollewell that his role in securing the fraudulent obtained bank loans was minimal in comparison to Mr. Peugh's involvement. This also suggests a wide difference in sentences is proper.

In view of the foregoing, I have determined that a sentence within the guideline range is the most appropriate sentence in this case. I conclude that a sentence sufficient but not greater than necessary to comply with the purpose set forth in paragraph two of Section 3553(a) is as follows. I believe probation would deprecate the seriousness of the offender's conduct and would improperly minimize his culpability and would be inconsistent with the ends of justice.

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 70 months on each count, three, four, seven, eight, and nine. This jail sentence is to be served concurrently on all the counts.

Upon release from imprisonment, the defendant shall serve a term of supervised release of three years on each of the counts to be served concurrently. The defendant shall comply with the standard conditions contained in the supervised release order and shall also comply with the following conditions. The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. The defendant shall cooperate with the collection of DNA as directed by the probation officer.

In regard to a fine, I have also considered the factors contained in Section 3572. The court declines to impose a fine in this case because the defendant is unable to pay a fine and is not likely to be able to do so. The defendant shall pay a special assessment of $100 on each count, for a total special assessment of $500. That amount is due immediately.

As to restitution, the government argues in its sentencing memorandum that the submission included in the third supplemental report -- I misstated that. The government argues in its sentencing memorandum and the submission included in the third supplemental report that restitution is owed to State Bank based on the entire scheme to defraud, which includes the loans referenced in Counts 1 and 2, for a total amount of $1,967,055.30. The court agrees that this amount is properly included as restitution and will be reflected in the judgment. The restitution obligation will be joint and several with Mr. Peugh's codefendant, Steven Hollewell.

The defendant indicated at the previous sentencing hearing that he objected to the inclusion of the loans referenced in Counts 1 and 2 because he was acquitted of those charges. It is true that restitution generally is limited to the loss caused by the crimes of which the defendant stands convicted. However, as the Seventh Circuit tells us in United States v. Belk, 435 F.3d 817, in a case in which the defendant is convicted of a scheme to defraud, restitution for the whole scheme is in order.

Here defendant in Count 3 of the superseding indictment was convicted of a scheme to defraud State Bank which began in or about January 1999 and continued through August of 2000, the object of which was to acquire loans totaling in excess of 2.5 million. Although each count, including Count 3, alleged a separate execution of the scheme, the defendant nevertheless was convicted of the entire scheme. Accordingly, the entire loss amount to State

Bank is properly included in the restitution calculation.

In regard to restitution, I have also considered the factors contained in Sections 3663 and 3664. I will order that the defendant shall pay restitution of $1,967,055.30 to State Bank in Freeport, Illinois. That restitution is joint and several with the restitution obligation of Steven Hollewell. That restitution amount is due immediately.

During the term of incarceration, payment of the special assessment and restitution shall be made in accordance with the Bureau of Prisons Inmate Financial Responsibility Program. If the outstanding special assessment and restitution obligation are not paid in full during the term of incarceration, then during his term of supervised release and as a condition of that supervised release, the defendant shall pay to the Clerk of the Court at least 10 percent of the defendant's gross earnings minus federal and state income tax withholding to satisfy the special assessment and restitution obligation.

The defendant shall notify the court and Attorney General of any material change in his economic circumstances that might affect the defendant's ability to pay restitution.

Mr. Love, have I addressed all your arguments?

MR. LOVE: Yes, your Honor.

THE COURT: Mr. Cain, have I addressed all your arguments?

MR. CAIN: Yes, sir, I believe so.

THE COURT: Do counsel for either the government or the defense know of any reason other

than those already presented, which are of record and have been preserved for the record, why the sentence should not be imposed as stated? Mr. Love.

MR. LOVE: None are known to the government.

THE COURT: Mr. Cain.

MR.CAIN: You're not referring to taking Mr. Peugh into custody today, are you, sir?

THE COURT: What's the government's position?

MR. LOVE: We have no objection to 30 to 40 days being given to the defendant for him to report, to self-report. I believe the court can reasonably find by clear and convincing evidence that he is not a risk of flight.

THE COURT: I agree.

MR. CAIN: I certainly agree with that.

THE COURT: Do you know of any other reason other than what you've already expressed why the sentence should not be imposed as stated?

MR. CAIN: No, I don't.

THE COURT: All right. I will enter judgment of conviction and order the sentence imposed as stated.

Marvin, you have a right to appeal the adjudication of guilt in this case, as well as the sentence imposed by me. Any notice of appeal must be filed within 14 days of the entry of judgment. You or your attorney may file a notice of appeal. If you so request, the Clerk will prepare and file a notice of appeal on your behalf. If you are unable to pay appeal costs, you have a right to ask for permission to appeal in forma pauperis. If you are unable to afford

an attorney, the Court of Appeals may appoint an attorney to represent you on appeal at no cost to you.

I find by clear and convincing evidence that Mr. Peugh is not likely to flee or pose a danger to the safety of any other person or the community if released. I need a date.

MR. CAIN: Judge, will you make a recommendation, please, with respect to place of incarceration for Oxford camp?

THE COURT: To where?

MR. CAIN: Oxford.

THE COURT: Yes.

MR. CAIN: As you, I'm sure, know, we will end up filing a notice of appeal within the requisite time. It's 14 days from today. Is that what you said?

THE COURT: Right.

MR. CAIN: It may be that we would ask you to address a motion to continue Mr. Peugh on bail pending appeal. Can you give us a date to come back to address that, your Honor?

MR. LOVE: We'll be opposing any such motion, your Honor. I would recommend that the court set a date so that the Bureau of Prisons machinery can get into motion, and the defense will have the interim time period to address any motions to the court.

THE COURT: I will. What date would you like?

MR. CAIN: May we have a week from today?

THE COURT: Pardon me?

MR. CAIN: May we have a week from today to file and bring a motion relating to --

THE COURT: Sure. How much time would you like to respond?

MR. LOVE: A week.

THE COURT: Can I set this for May 28 for hearing?

MR. CAIN: Yes, sir.

MR. LOVE: That's fine.

THE COURT: 2:30.

MR. CAIN: Judge, thank you very much.

THE COURT: Wait a minute. I still need a date to report.

MR. CAIN: I'm sorry?

THE COURT: I still need a date to report.

MR. CAIN: Oh, okay. I'm sorry.

THE COURT: I'm asking you for what you would suggest.

MR. CAIN: I'd ask for 60 days. July 10th, your Honor?

THE COURT: Let's say July 12th. The defendant will report to the institution designated by the Bureau of Prisons at 2:00 p.m. on July 12th to begin serving his sentence.

Marvin, all of the conditions that control your activity up to today's date continue to apply. So, all of those bond conditions are still in effect. Please be very careful not to violate any of them. It could have a very adverse effect on the way your case is handled. That's all.

MR. CAIN: Thank you.

THE COURT: You're welcome. Court's in recess.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____

Mary T. Lindbloom
Official Court Reporter

PETITIONER'S BRIEF

No. 12-62

IN THE

Supreme Court of the United States

MARVIN PEUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

The U.S. Sentencing Guidelines Manual directs a court to "use the Guidelines Manual in effect on the date that the defendant is sentenced" unless "the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the Ex Post Facto Clause of the United States Constitution." Eight courts of appeals have held that the Ex Post Facto Clause is violated where retroactive application of the Sentencing Guidelines creates a significant risk of a higher sentence. In the decision below, however, the Seventh Circuit held that the Ex Post Facto Clause is never violated by retroactive application of the Sentencing Guidelines because the Guidelines are advisory, not mandatory.

The question presented is:

Does a sentencing court violate the Ex Post Facto Clause by using the U.S. Sentencing Guidelines in effect at the time of sentencing rather than the Guidelines in effect at the time of the offense, if the newer Guidelines create a significant risk that the defendant will receive a longer sentence?

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BRIEF FOR RESPONDENT

Petitioner Marvin Peugh respectfully asks this Court to reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The judgment of the United States District Court for the Northern District of Illinois is unreported but reprinted at Pet. App. 14a-25a, and the oral ruling of the district court is reproduced at Pet. App. 28a. The Seventh Circuit's opinion and order, affirming the judgment of the district court, is reported at 675 F.3d 736 and reprinted at Pet. App. 1a-13a.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2012. Pet. App. 1a-13a. A timely petition for certiorari was filed on July 16, docketed on July 17, and granted on November 9, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND GUIDELINES INVOLVED

The Ex Post Facto Clause of the U.S. Constitution provides, "No . . . ex post facto Law shall be passed." U.S. CONST. art. I, § 9, cl. 3. The relevant provisions of the 1998 U.S. SENTENCING GUIDELINES MANUAL

(§§ 2F1.1, 3C1.1, and 5A) and the 2009 U.S. SENTENCING GUIDELINES MANUAL (§§ 1B1.11, 2B1.1, 3C1.1, 5A, and Appendix C, Vol. II, Amendments 617 and 653) are reproduced at Pet. App. 44a-68a.

INTRODUCTION

In *Garner v. Jones*, this Court held that the Ex Post Facto Clause forbids retroactive application of a law that "creates a significant risk of prolonging [the defendant's] incarceration." 529 U.S. 244, 251 (2000). The current U.S. Sentencing Guidelines pose exactly that risk. Even though district courts are no longer bound to sentence defendants within Guidelines ranges after *United States v. Booker*, 543 U.S. 220 (2005), the practical effect of the *Booker* remedy is to promote sentencing at or near the Guidelines range. Under *Booker* and its progeny, federal district courts must correctly calculate and consider Guidelines ranges, and must ensure that a justification for a variance is sufficiently compelling to support its degree. Appellate courts must in turn review the sentence for substantive reasonableness and may presume that within-Guidelines sentences are reasonable. Thus, setting aside cases in which the government sponsors downward departures or variances, roughly three-quarters of federal sentences fall within the advisory Guidelines ranges. Upward departures are rare, and when judges do deviate from Guidelines ranges, those deviations are typically modest. In other words, federal sentences converge upon Guidelines ranges. Thus, when the U.S. Sentencing Commission increases sentencing ranges, as it did in 2001 and 2003 for economic crimes,

retroactively applying the amended Guidelines creates a significant risk of increasing a defendant's sentence. Every court of appeals to reach the question has so held, save for the court below.

Mr. Peugh's sentencing is a case in point. The 1998 Guidelines in effect at the time of his offense called for a sentence of 37 to 46 months. But the retroactively applied 2009 Guidelines nearly doubled his Guidelines sentencing range to 70 to 87 months. The district court expressly declared that it would defer to the 2009 Guidelines and imposed a 70-month sentence. That sentence was at the very bottom of the 2009 Guidelines range, but 24 months greater than the *maximum* of the 1998 Guidelines sentencing range. That retroactive application of the 2009 Guidelines indisputably increased the risk that Mr. Peugh would receive increased punishment, and thus violated the Ex Post Facto Clause. The court of appeals erred in permitting the 2009 Guidelines to be applied retroactively to Mr. Peugh. Thus, the judgment below should be reversed.

STATEMENT OF THE CASE

A. Legal Background

Before the Sentencing Reform Act of 1984 ("SRA"), "the Federal Government employed in criminal cases a system of indeterminate sentencing." *Mistretta v. United States*, 488 U.S. 361, 363 (1989). Congress established broad ranges of potential penalties for federal crimes and "delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the

customarily wide range so selected." *Id.* at 364. But indeterminate sentencing often generated arbitrary punishment. "Under this system, each federal district judge was free to implement his or her individual sentencing philosophy, and therefore the sentence imposed in a particular case often depended heavily on the spin of the wheel that determined the judge to whom the case was assigned." *Pepper v. United States*, 131 S. Ct. 1229, 1257 (2011) (Alito, J., concurring in part, concurring in the judgment in part, and dissenting in part).

After a century of experience with indeterminate sentencing, Congress determined that "[t]he shameful disparity in criminal sentences is a major flaw in the existing criminal justice system," S. Rep. No. 98–223, p. 62 (1983), and passed the SRA to reshape federal sentencing. The SRA established the Sentencing Commission "as an independent commission in the judicial branch." 28 U.S.C. § 991(a). Congress directed the Commission to, among other things, "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors." *Id.* § 991(b)(1)(B).

To achieve greater uniformity in sentencing, Congress charged the Commission with developing Sentencing Guidelines that would be applied across the federal courts. "More particularly, Congress directed the Commission to develop a system of 'sentencing ranges' applicable 'for each category of

offense involving each category of defendant.'" *Mistretta*, 488 U.S. at 374 (quoting 28 U.S.C. § 994(b)). Congress required the Commission to formulate Guidelines that were consistent with Title 18. And it specified that any term of imprisonment authorized by the Guidelines "shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment." 28 U.S.C. § 994(b)(2). Congress further prescribed the offense and offender characteristics that the Commission should consider in promulgating guidelines. *Id.* § 994(c)–(n). This Court held in *Mistretta* that the SRA was a lawful delegation of Congress's lawmaking power, and that the mandatory Guidelines had the force and effect of law. 488 U.S. at 391; *see also Stinson v. United States*, 508 U.S. 36, 45 (1993) (noting that Guidelines, which are promulgated by notice-and-comment informal rulemaking, 28 U.S.C. § 994(x), "are the equivalent of legislative rules adopted by federal agencies").

A central feature of the Act as originally conceived was that the Guidelines would bind district courts in imposing individual sentences. Subsection 3553(a) of Title 18 requires the district court to consider the Guidelines sentencing ranges when imposing a sentence. *Id.* § 3553(a)(4). Subsection 3553(b)(1) further directed that the court "shall impose a sentence of the kind, and within the range" established by the Guidelines, subject to departures when the Commission failed adequately to take into account a pertinent aggravating or mitigating circumstance. *Id.* § 3553(b)(1) (2006). The district court must provide a specific statement of reasons

explaining any departure from the guidelines. *Id.* § 3553(c)(2). And the statute, as amended, specified that appellate courts should review district courts' application of the Guidelines deferentially, while reviewing any grounds for departure *de novo*. *See id.* § 3742(e) (2006).

In *Booker*, this Court ruled that the SRA ran afoul of the Sixth Amendment because the Guidelines imposed binding maximum sentences (and thus increased the sentence that could be imposed) based on facts that were tried to the sentencing judge and not the jury, subject only to departures that were rarely applied. 543 U.S. at 230–34 (Stevens, J., merits majority opinion). To remedy the constitutional defect, this Court severed two provisions: § 3553(b)(1), which made the Guidelines ranges mandatory, and § 3742(e), which directed appellate courts to review departures from the Guidelines *de novo*. *Id.* at 245 (Breyer, J., remedial majority opinion); *see also Pepper*, 131 S. Ct. at 1243–45 (severing 18 U.S.C. § 3742(g), which prohibited resentencing outside the Guidelines range, as inconsistent with the Sixth Amendment).

Although the Guidelines are advisory in that they no longer fix binding limits on an individual's sentence, they still carry prescriptive force. The Guidelines dictate the methodology and necessary factual findings for calculating sentencing ranges. That is a mandatory first step in federal sentencing. District courts, as well as probation officers in formulating presentence reports, must first follow this methodology and make these findings. Under the advisory Guidelines, a sentencing judge must "(1) find[] the applicable offense level and offender

category and then (2) consult[] a table that lists proportionate sentencing ranges . . . at the intersections of rows (marking offense levels) and columns (marking offender categories)." *Dorsey v. United States*, 132 S. Ct. 2321, 2326–27 (2012). "The Guidelines, after telling the judge how to determine the applicable offense level and offender category, instruct the judge to apply the intersection's range in an ordinary case, but they leave the judge free to depart from that range in an unusual case." *Id.* at 2327.

The Guidelines range is first calculated by the probation officer in the presentence report. "The presentence report must" identify applicable Guidelines, calculate offense levels and criminal history categories, "state the resulting sentencing range and kinds of sentences available," identify appropriate sentencing factors, and identify any basis for departing from the sentencing range. FED. R. CRIM. P. 32(d)(1). The parties may object to the "applicable sentencing range" in the presentence report, and the district court must rule on any unresolved objections at sentencing. FED. R. CRIM. P. 32(f) & (i). A district court must give controlling weight to the Commission's official commentary in interpreting and applying the Guidelines. *Stinson*, 508 U.S. at 38.

This obligatory first phase of sentencing results in a substantive standard: the Guidelines sentencing range. Even though the Court is not bound to sentence within the range, the district court must consider that range in fixing a sentence. In defining the seven mandatory considerations in any federal sentencing, the Act expressly declares that "[t]he

court, in determining the particular sentence to be imposed, *shall consider* ... the kinds of sentence and the sentencing range established for ... the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines ... issued by the Sentencing Commission," including any congressional amendment. 18 U.S.C. § 3553(a)(4)(A)(i) (emphasis added). "The district courts, while not bound to apply the Guidelines, *must consult* those Guidelines and take them into account when sentencing," and "[t]he courts of appeals review sentencing decisions for unreasonableness." *Booker*, 543 U.S. at 264 (Breyer, J., remedial majority opinion) (emphasis added). This Court severed the constitutionally offensive provisions, rather than striking down the Act or changing its system of judge-based sentencing, because the severed Act continued to serve Congress's fundamental purpose of promoting uniformity. "These features of the remaining system, while not the system Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264–65.

The SRA directs that the district court shall consider the Guidelines "in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(4)(A)(ii). This case raises the question of whether the Ex Post Facto Clause requires courts to apply the Guidelines in effect on the date of the offense of conviction, when the Guidelines in effect at the time of sentencing call for a higher sentence. *See also* U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b) (2011) (implementing section 3553(a)(4)(A)(ii) with the

proviso that "[i]f the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the Ex Post Facto Clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.").

B. Facts And Proceedings Below

1. District Court

In 2010, Petitioner Marvin Peugh was convicted of five counts of bank fraud under 18 U.S.C. § 1344 for acts performed between 1999 and 2000 in connection with loans received for farming businesses Mr. Peugh ran with his cousin.[1] Pet. App. 2a, 3a, 5a. Mr. Peugh is currently serving a 70-month prison term for these offenses. *See id.* at 6a. Mr. Peugh's cousin, Steven Hollewell, received a 12-month sentence as a result of a negotiated plea of guilty to one count; the other counts were dropped in exchange for Mr. Hollewell's agreement to testify for the United States. *Id.* at 6a.

The dispute in this case is whether the district court should have applied the 1998 or the 2009 Sentencing Guidelines. The former were in effect at the time of the offenses; the latter were in effect at

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[1] One count pertained to allegedly fraudulent loan activity and four counts pertained to an alleged check-kiting scheme. Mr. Peugh was acquitted on fraudulent-loan counts 1 and 2, convicted of fraudulent-loan count 3, acquitted on check-kiting counts 6 and 7, and convicted of check-kiting counts 4, 5, 8 and 9. Pet. App. 3a, 5a.

the time of sentencing. As set forth in the presentence report, the applicable 1998 Guidelines for Mr. Peugh's fraud offenses set a base offense level of 6, and then added 13 levels for losses over $2.5 million.[2] Sealed J.A. 148; *see also* U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (Nov. 1, 1998) (Pet. App. 44a–46a). Mr. Peugh's total offense level was thus 19. Sealed J.A. 148. Because Mr. Peugh was a first-time offender, he was assigned to the lowest criminal-history category, Category I. *Id.* at 126. The presentence report accordingly calculated Mr. Peugh's 1998 Guidelines sentencing range as 30 to 37 months. *Id.* at 148; U.S. SENTENCING GUIDELINES MANUAL § 5A (Nov. 1, 1998) (Pet. App. 48a).

The Government acknowledged these calculations, but argued that, if the 1998 Guidelines applied, there should be an additional two-level enhancement for obstruction of justice, bringing the total offense level to 21. Brief for the United States, Plaintiff-Appellee, at 11, *United States v. Peugh*, No. 10-2184 (7th Cir. July 5, 2011); *see* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (Nov. 1, 1998) (Pet. App. 47a). Thus, according to the Government, Mr. Peugh's total offense level under the 1988 Guidelines would have been 21, with a concomitant sentencing range of 37 to 46 months. *Id.* § 5A (Pet. App. 48a).

After Mr. Peugh's offenses of conviction were complete in 2000, the Sentencing Commission amended the bank-fraud guidelines in significant

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[2] The fraud offenses were grouped together for purposes of Guidelines calculations because they involved the same course of conduct. Sealed J.A. 123.

respects. First, Amendment 617 in 2001 deleted the fraud-and-deceit Guideline § 2F1.1 and consolidated it with the general economic-crimes Guideline § 2B1.1. Amendment 617 to the Sentencing Guidelines, effective Nov. 1, 2001 (Pet. App. 64a–67a.). That same amendment raised the enhancement for losses of at least $2.5 million to 18 levels, an increase of 5 levels from the 1998 Guidelines. *Id.* Second, Amendment 653 in 2003 raised the base offense level for Mr. Peugh's offenses from 6 to 7. Amendment 653 to the Sentencing Guidelines, effective Nov. 1, 2003 (Pet. App. 68a).

Those amendments were still effective in the 2009 Guidelines. Thus, under those Guidelines, Mr. Peugh had a base offense level of 7 and an enhancement of 18 levels for a loss exceeding $2.5 million. Sealed J.A. 123–24; U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a)(1), 2B1.1(b)(1)(J) (Nov. 1, 2009) (Pet. App. 53a (mislabeled there as 2B1.1(c)(1), 2B1.1(d)(1)(J)). With a 2-level enhancement for obstruction of justice, Mr. Peugh's total offense level was 27. *Id.* § 3C1.1 (Pet. App. 59a). That offense level yielded a sentencing range of 70 to 87 months, which is 33 to 41 months higher than the 1998 Guidelines range. U.S. SENTENCING GUIDELINES MANUAL § 5A (Nov. 1, 2009) (Pet. App. 62a).

At sentencing, Mr. Peugh challenged the court's use of the 2009 Guidelines rather than the 1998 Guidelines in effect at the time of his offenses, [3]

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[3] The court of appeals referred throughout its opinion to the "1999 Guidelines." *See, e.g.*, Pet. App. 5a, 8a; *see also* Opp. 3 n.1 (referring to "the 1999 version of the Guidelines," but noting

(continued...)

asserting that application of the newer Guidelines violated the Ex Post Facto Clause because they resulted in a longer sentence not authorized at the time of the offense. *Id.* at 5a; *see also* Defendant's Objections to Presentence Investigation Report 1–2, *United States v. Peugh*, No. 08-CR-50014 (N.D. Ill. Apr. 2, 2010). The district court rejected Mr. Peugh's argument on the authority of *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006), which held that advisory Guidelines do not implicate *ex post facto* concerns. Pet. App. 28a ("The court is bound by the holding in *Demaree*, and, accordingly, the court overrules the defendant's objection to use of the 2009 guidelines manual."). Accordingly, the district court applied the 2009 Guidelines range of 70 to 87 months, but imposed the lowest sentence within that range

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(...continued)

that "[i]n all respects relevant to this case" the 1998 and 1999 versions were identical). But the Guidelines in effect at the time of the offenses in 1999 and 2000 were actually published in November 1, 1998, so we refer to them as the "1998 Guidelines." According to the Sentencing Commission's Interim Director, "[b]ecause no new guideline amendments were promulgated in the 1999 amendment cycle, the Commission does not plan to publish a 1999 edition of the *Guidelines Manual* at this time." Letter from Timothy B. McGrath, Interim Staff Director, U.S. Sentencing Comm'n (Oct. 12, 1999), *reprinted in* U.S. SENTENCING GUIDELINES MANUAL (1999). That letter advised people to continue to use the 1998 edition until further notice. *Id.* The Presentence Report in this case identified the 1998 Guidelines as the ones in effect at the time of Mr. Peugh's offense. Sealed J.A. 148.

(70 months) on Mr. Peugh. Pet. App. 2a; Pet. App. 17a; J.A. 100-101.[4]

In sentencing Mr. Peugh, the district court made plain that it was hewing to the 2009 Guidelines, rather than following "its own penal philosophy," even though it acknowledged the freedom to do the latter. The district court noted the Seventh Circuit's direction to a sentencing judge to "think long and hard before substituting his personal penal philosophy for that of the Commission," in light of the Commission's experience and expertise. J.A 94. Section 2B1.1, the court noted, evinces a policy of increasing punishments based on increasing loss amounts, and the court was "not convinced that this general policy should be disregarded in this particular case." *Id.*

Because the district court did not disagree with that policy, it explicitly stated that it would "*give* the amount of loss calculations and *the resulting advisory guidelines* range the appropriate amount of *deference* in this case." J.A. 96 (emphases added). The district court expressed no opinion on the sentence it would have imposed had it applied the 1998 Guidelines.

2. Court Of Appeals

On appeal, Mr. Peugh again argued that his sentence violated the Ex Post Facto Clause, because the 2009 Guidelines called for a sentencing range

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[4] The presentence report did not find any grounds for upward departure, Sealed J.A. 148, and the Government did not seek one.

that was 33 to 41 months longer than the sentence that would have applied under the 1998 Guidelines. Pet. App. 5a, 8a–9a. Retroactive application of the 2009 Guidelines undeniably resulted in a harsher sentence: Mr. Peugh's 70-month sentence was at the very bottom of the 2009 Guidelines range, but was 24 months longer than the top of the 1998 Guidelines range. *See* Brief of Marvin Peugh, Defendant-Appellant at 30, *United States v. Peugh*, No. 10-2184 (7th Cir. April 21, 2011)[5]; *compare* Pet. App. 47a–51a and Pet. App. 59a–63a. The court of appeals, like the district court, relied on *Demaree* in rejecting Peugh's argument. Pet. App. 8a.

SUMMARY OF ARGUMENT

The Ex Post Facto Clause forbids applying retroactively laws that would increase, or create a significant risk of increasing, the punishment for an offense beyond the punishment annexed to the crime at the time of its commission. The Ex Post Facto Clause applies even where the decisionmaker exercises discretion in the imposition or administration of punishment. The question is determined by the practical operation and objective effect of the new law, in the context of the sentencing system as a whole.

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[5] The Seventh Circuit observed that as a result of application of the 2009 Guidelines, "Peugh's advisory range jumped by more than 20 months," Pet. App. 8a (*Peugh*, 675 F.3d at 741), but more precisely it increased the upper limit of the range by 41 months, resulting in a sentence 24 months above the top of the 1998 range.

Retroactive application of harsher Guidelines violates the Ex Post Facto Clause. The Guidelines are advisory because, in *Booker*, this Court excised the statutory provisions that required the district court to sentence within the Guidelines sentencing range, absent a basis for departure, and that subjected departures to *de novo* review. But the Guidelines retain prescriptive force. District courts must follow the methodology set forth in the Guidelines to calculate the Guidelines sentencing range, and then must consult and seriously consider that Guidelines range in determining the appropriate sentence. The district court must begin with the Guideline sentencing range as a starting point, and must consider it as a benchmark throughout the sentencing process. Furthermore, the district court must marshal sufficiently compelling reasons to justify deviations from the Guidelines sentencing range, with major deviations requiring greater justification than minor ones. Courts of appeals review sentences for substantive as well as procedural reasonableness, and may apply a presumption of reasonableness to any sentence that is within the Guidelines sentencing range.

The practical effect of the post-*Booker* Guidelines is that actual sentences, in the main, tend to be within or very near the Guidelines sentencing range. The Guidelines sentencing range in most cases serves as an anchor for the judge's determination of an appropriate term of imprisonment. Moreover, many judges believe in the goal of eliminating sentencing disparity and in following the Guidelines as a means of achieving that end. Appellate review of the substantive reasonableness of the sentence, and the presumption of reasonableness that appellate courts

may apply to within-Guidelines sentences, further give judges incentives to impose sentences within the Guidelines range.

Indeed, empirical data confirm the gravitational pull of the Guidelines on judges' sentences. Approximately three-quarters of sentences imposed after *Booker* are within the Guidelines range (or below that range because of a government-sponsored departure under the Guidelines). When courts do deviate from the Guidelines, the deviation is often minimal. Appeals of sentences for substantive reasonableness are common, and reversals of within-Guidelines cases for unreasonableness are rare. The Guidelines exert similar effects on plea bargains and sentencing agreements between prosecutors in defendants. Thus, the advisory Guidelines in practice cause judges to impose the vast majority of sentences within or near Guidelines ranges. Accordingly, retroactive application of harsher post-offense Guidelines creates a significant risk that the defendant will receive greater punishment than if he or she had been sentenced under more lenient Guidelines in effect at the time of offense.

The advisory Guidelines had just that effect on Mr. Peugh. Because of intervening Guidelines amendments that increased sentence ranges based on the amount of economic loss, the 2009 Sentencing Guidelines nearly doubled the sentencing range applicable to Mr. Peugh's offense vis-à-vis the 1998 Sentencing Guidelines in force at the time of his offense. The district court consciously and expressly followed the 2009 Sentencing Guidelines, accepting the policies embedded therein. The court chose a sentence (70 months) at the very bottom of the 2009

range, but that sentence would have been 24 months greater than the *maximum* allowed under the 1998 Guidelines. This is not just a significant risk of increased punishment. It is inconceivable that the same district court applying the 1998 Guidelines would have imposed a 70-month sentence, especially when there are no grounds for upward departure. The retroactive application of the Sentencing Guidelines as applied to Mr. Peugh violated the Ex Post Facto Clause.

ARGUMENT

A. *The Ex Post Facto Clause Forbids Laws That Create A Significant Risk Of Increased Punishment.*

Article 9 of the Constitution provides that "[n]o ex post facto Law shall be passed." U.S. CONST. art. I, § 9, cl. 3. This Court has identified four kinds of Ex Post Facto violations:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the

> time of the commission of the offence, in order to convict the offender.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798); *Collins v. Youngblood*, 497 U.S. 37, 41–42 (1990) (treating *Calder* as accurately stating the scope of the Ex Post Facto Clause). The third *Calder* category at issue here – the ban on increasing punishment for a crime after it was committed – is "[t]he heart of the Ex Post Facto Clause." *Johnson v. United States*, 529 U.S. 694, 699 (2000).

"The *Ex Post Facto* Clause raises to the constitutional level one of the most basic presumptions of our law: legislation, especially of the criminal sort, is not to be applied retroactively." *Id.* at 701. "[T]he nature or amount of the punishment imposed for [a crime's] commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). The Clause "assure[s] that legislative Acts give fair warning of their effect and permit[s] individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981). It "also restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Id.* at 29. In addition, the Ex Post Facto Clause serves "a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell v. Texas*, 529 U.S. 513, 533 (2000). Regulations, like statutes, are laws subject to the strictures of the Ex Post Facto Clause. *See Garner*,

529 U.S. at 247 (analyzing whether state parole board regulation violated the Ex Post Facto Clause).

In applying the Ex Post Facto Clause, this Court looks not to "the subjective motivation" of the lawmaker, but rather to whether "objectively" the change in law "had the effect of lengthening petitioner's period of incarceration." *Lynce v. Mathis*, 519 U.S. 433, 442–43 (1997); *Weaver*, 450 U.S. at 33. The Ex Post Facto Clause does not require showing an actual or necessary effect. Rather, this Court "must determine whether [the amendment] produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *California Dep't of Corrections v. Morales*, 514 U.S. 499, 509 (1995) (finding that decreasing the frequency of parole hearings in cases unlikely to qualify for parole did not violate the Ex Post Facto Clause because the risk of enhanced confinement was too speculative and attenuated). That question is necessarily "a matter of 'degree'," and this Court has never devised a "single 'formula' for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition." *Id.* (quoting *Beazell*, 269 U.S. at 171).

In *Garner*, another case involving changes to parole regulations, this Court further defined the *Morales* significant-risk standard. The *Garner* Court emphasized that "[t]he presence of discretion does not displace the protections of the Ex Post Facto Clause." 529 U.S. at 253. The question is whether the retroactively applied rule "creates a significant risk of prolonging [the defendant's] incarceration," viewed in the context of the system as a whole. *Id.* at 251–52.

The assessment of risk depends upon whether the "practical implementation" of the rule may influence a decisionmaker's "exercis[e of] discretion" so as to lengthen incarceration. *Id.* at 255. The defendant must show that "as applied to his own sentence the law created a significant risk of increasing his punishment," drawing on evidence of "the general operation" of the system as a whole. *Id.*

B. *Amended Sentencing Guidelines That Increase The Applicable Sentencing Range Create A Significant Risk Of Increased Punishment.*

1. Advisory Guidelines Promote Sentencing Within Or Near Guidelines Ranges.

Even under the post-*Booker* "advisory" Guidelines regime, increases in Guideline sentencing ranges create a significant risk of increased incarceration. Retroactive application thus violates the Ex Post Facto Clause.

While the Guidelines no longer impose binding sentencing ranges, they continue to have the force and effect of law, albeit in a more limited fashion. As this Court has stated, "a district court should begin *all* sentencing proceedings by *correctly* calculating the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49 (2007) (emphasis added). The Guidelines define a mandatory methodology for generating a substantive standard (the Guidelines

sentencing range) for use in sentencing.[6] Errors in calculating the Guidelines are a basis for reversal on appeal. 18 U.S.C. § 3742(f); *Gall*, 552 U.S. at 51. Indeed, appellate courts commonly reverse sentences on that basis.[7]

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[6] The Guidelines, which "are the equivalent of legislative rules adopted by federal agencies," *Stinson*, 508 U.S. at 45, are in this respect analogous to regulations whereby one federal agency defines methods that others follow (even though the district court need not ultimately adhere to the Guidelines sentencing range). *See, e.g., Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 757 (2004) ("The Council of Environmental Quality (CEQ), established by NEPA with authority to issue regulations interpreting it, has promulgated regulations to guide federal agencies in determining what actions are subject to that statutory requirement."); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354 (1989) (requiring that federal agencies follow CEQ regulations). Furthermore, this Court has continued to find that the Commission's policy statements unaffected by *Booker* may be treated as mandatory. *Dillon v. United States*, 130 S. Ct. 2683, 2692 (2010) (after a decrease in the length of the applicable Guidelines, a court did not err in following the Commission's policy barring a reduction in sentence to a level lower than the new base amount).

[7] *See, e.g., United States v. Love*, 680 F.3d 994, 998 (7th Cir. 2012) ("Even though Love received a sentence that was significantly below the guidelines range, the range on which his sentence was based was erroneously calculated. Such an error is not harmless because it is impossible to know whether the district court would have imposed the same sentence had it not committed this procedural error."); *United States v. Barrientos*, 670 F.3d 870, 873 (8th Cir. 2012); *United States v. Evans-Martinez*, 611 F.3d 635, 642 (9th Cir. 2010) ("Because the district court committed procedural error when it used 120 months' imprisonment as the Guidelines sentence for all three counts, we vacate and remand the sentences for sexual abuse of a child (Count 1) and witness tampering (Count 3) to allow the district court to impose sentences based on the correct

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Once the district court has performed the mandatory calculation of the Guidelines sentencing range, "[t]he court, in determining the particular sentence to be imposed, *shall consider* ... the kinds of sentence and the sentencing range established for ... the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines ... issued by the Sentencing Commission," including any congressional amendments. 18 U.S.C. § 3553(a)(4)(A)(i) (emphasis added). "The district courts, while not bound to apply the Guidelines, *must consult* those Guidelines and take them into account when sentencing." *Booker*, 543 U.S. at 264 (Breyer, J., remedial majority opinion) (emphasis added).

Accordingly, "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall*, 552 U.S. at 49. "[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Id.* at 50 n.6. The judge must make an individualized assessment of the proper sentence considering all the § 3553(a) factors, and reasoned discretionary decisions to sentence outside the Guidelines range contribute to the "continuous evolution" of the Guidelines. *Rita v. United States*, 551 U.S. 338, 350 (2007). But if the district judge "decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is

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Guidelines sentencing range of 30-37 months' imprisonment."), *cert. denied*, 131 S. Ct. 956 (2011).

sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50. "[A] major departure should be supported by a more significant justification than a minor one." *Id.; see also id.* at 46 ("a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications").

In every case, then, the district court must seriously consider the Guidelines sentencing range, justify any deviation, and offer even more compelling justifications for major deviations. These requirements cause actual sentences, in the main, to converge upon the Guidelines ranges. Indeed, the *Booker* remedy sought to maintain this general convergence of sentences. Even if the scheme Congress enacted could not survive, this Court observed, the remediated statute will "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Booker*, 543 U.S. at 264–65 (Breyer, J., remedial majority opinion); *see also Kimbrough v. United States*, 552 U.S. 85, 107–08 (2007).

"Practically speaking, applicable Sentencing Guidelines provide a starting point or 'anchor' for judges and are likely to influence the sentences that judges impose." *United States v. Turner*, 548 F.3d 1094, 1099 (D.C. Cir. 2008); *see also* Birte Englich et al., *Playing Dice With Criminal Sentences: The Influence Of Irrelevant Anchors On Experts' Judicial Decision Making*, 32 PERSONALITY & SOC.

PSYCHOL. BULL. 188, 197 (2006) (confirming that "irrelevant anchor values that were obviously determined at random may influence sentencing decisions of legal professionals"). Moreover, many district courts still choose to sentence within the advisory Guidelines ranges because they believe in the policy of eliminating unwarranted sentencing disparities. *See* U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 tbl.19 (2010) ("2010 JUDGES' SURVEY") (reporting that, when asked which system "best achieves the purposes of sentencing," 75% of district court judges favored the current advisory guidelines system, 8% favored no guidelines, 3% favored the pre-*Booker* mandatory Guidelines, and 14% favored mandatory guidelines with broader ranges, jury factfinding, and fewer mandatory minimums). These judges may be chary of relying on their own sentencing instincts, except in unusual circumstances. They may recognize that the Commission "has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." *Kimbrough*, 552 U.S. at 109. Courts realize that "even though the Guidelines are advisory rather than mandatory," ordinarily "they are ... the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions." *Gall*, 552 U.S. at 46.

Still other courts, even if not disposed to favor Guidelines-based sentencing, respect that Congress has given that approach its imprimatur, and often promoted its sentencing policies through directives to the Commission to reflect them in the Guidelines.

See 28 U.S.C § 994(c)–(n). As the former chair of the Commission recently put it, the "guidelines have become accepted as part of the 'culture' of the federal criminal justice system" and continue to influence sentencing decisions. William K. Sessions III, *At The Crossroads Of The Three Branches: The U.S. Sentencing Commission's Attempts To Achieve Sentencing Reform In The Midst Of Inter-Branch Power Struggles*, 26 J.L. & POL. 305, 329 (2011).

A second post-*Booker* feature that promotes sentences within or near Guidelines ranges is the combination of substantive appellate review and deference to within-Guideline sentences. Appellate courts must review sentences for substantive reasonableness. *Booker*, 543 U.S. at 261 (Breyer, J., remedial majority opinion). And they "may apply a presumption of reasonableness to a district court sentence that reflects proper application of the Sentencing Guidelines." *Rita*, 551 U.S. at 347. This presumption, as a practical matter, encourages judges to sentence within the Guidelines range: "[J]udges are more likely to sentence within the Guidelines in order to avoid the increased scrutiny that is likely to result from imposing a sentence outside the Guidelines." *Turner*, 548 F.3d at 1099. Not only is a district court more likely to sentence in the Guidelines range, but such sentences are more likely to be upheld on appeal. An appellate court will reverse a sentence based on a correctly applied Guidelines range only when it is "definite[ly] and firm[ly] convi[nced] that the district court committed a clear error in judgment" and chose a sentence "outside the range of reasonable sentences" on the

facts. [8] *United States v. Wetherald*, 636 F.3d 1315, 1322 (11th Cir. 2010) (internal quotation marks omitted).

True to its purpose of promoting uniformity in sentencing, the post-*Booker* advisory Guidelines system operates "to cabin the potential sentence" that a judge may be willing to impose, absent special circumstances. *Wetherald*, 636 F.3d at 1321. Sentences under such a system tend to fall either within the Guidelines or not far from them. Guidelines amendments that increase sentencing ranges are thus likely to increase actual sentences; that is why the Commission and Congress raise ranges in the first place. Applying those increases retroactively creates a significant risk of increased

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[8] The judges who dissented from the adoption of substantive-reasonableness review in *Booker* and *Rita* predicted that it would cause sentences to continue to converge upon Guidelines ranges. *See Booker*, 543 U.S. at 313 (Scalia, J., dissenting in part) (querying whether "appellate review for 'unreasonableness' [will] preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges"); *Rita*, 551 U.S. at 373 n.3 (Scalia, J., concurring in part and concurring in the judgment in part) ("The only way to assure district courts that they can deviate from the advisory Guidelines ... is to prohibit appellate courts from reviewing the substantive sentencing choices made by district courts."); *id.* at 391 (Souter, J., dissenting) ("Without a powerful reason to risk reversal on the sentence, a district judge faced with evidence supporting a high subrange Guidelines sentence will do the appropriate factfinding in disparagement of the jury right and will sentence within the high subrange. . . . [A] trial judge will find it far easier to make the appropriate findings and sentence within the appropriate Guideline, than to go through the unorthodox factfinding necessary to justify a sentence outside the Guidelines range.").

punishment. *Turner*, 548 F.3d at 1099–1100. The Ex Post Facto Clause thus forbids applying them retroactively. *Garner*, 529 U.S. at 251.

2. Empirical Evidence Of How The Advisory Guidelines Operate In Practice Confirms The Risk Of Increased Punishment.

Where a system for administering punishment involves discretion, "evidence drawn from the rule's practical implementation" may demonstrate a significant risk of greater incarceration, and thus a violation of the Ex Post Facto Clause. *Garner*, 529 U.S. at 255. Here, experience with the advisory Guidelines system post-*Booker* clearly demonstrates that sentences converge upon the Guidelines sentencing ranges. Therefore, when Guidelines amendments increase the Guidelines sentencing range, they increase the risk of heavier punishments.

As this Court predicted, "some departures from uniformity were a necessary cost of the remedy" that converted mandatory Guidelines into advisory ones. *Kimbrough*, 552 U.S. at 107–08; *see also Booker*, 543 U.S. at 263–64 (Breyer, J., remedial majority opinion). In every year post-*Booker*, however, an overwhelming majority of sentences have either fallen within Guidelines sentencing ranges, or fallen below the Guidelines because of Government-sponsored departures sanctioned by the Guidelines. *See* UNITED STATES SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, FISCAL YEAR 2011, fig. G ("2011 SOURCEBOOK"). Indeed, in 2011, at least 76 percent of defendants were sentenced within the Guidelines range (54.5%) or below the range only

because of a Government-sponsored substantial-assistance or fast-track downward departure (21.9%). *Id.* tbl. N.[9] Unsurprisingly, 78% of federal district judges surveyed agree that the Guidelines have reduced unwarranted sentencing disparities. 2010 JUDGES' SURVEY, *supra*, tbl. 17.

The principal change since *Booker* has been the increase in sentences below the range without Government sponsorship. Even that increase, however, has been modest. By fiscal year 2011, the rate of non-government-sponsored downward departures and variances had increased only to 17.4%, despite controversy over the severity of some Guidelines. Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PA. L. REV. 1631, 1677 (2012) (analyzing Commission data). "When judges do depart or vary, the median decrease remains, as it was before *Booker*, exceedingly modest—about twelve months." *Id.*

Moreover, average sentences (which were below Guidelines ranges even before *Booker*, presumably because of Government-sponsored departures) have barely decreased since *Booker*. They declined from 46 months in 2005 to 43 months in 2011, primarily because of changes in crack cocaine penalties and immigration prosecutions. Baron-Evans & Stith, *supra*, at 1677–78. "Average sentence length has remained the same or slightly increased for all other important categories of offenses, except that it has slightly decreased for marijuana offenses, and has substantially increased for fraud offenses and child

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[9] The Government sponsored other downward departures or variances in an additional 4.4% of cases. *Id.*

pornography offenses." *Id.* at 1678 (footnotes omitted); *see* U.S. SENTENCING COMM'N, THIRD QUARTER FY12 QUARTERLY SENTENCING UPDATE, fig. C (Nov. 1, 2012). Sentencing disparities are considerably lower than in pre-Guidelines days. [10] *Booker* and its progeny may have given district court judges greater power to sentence outside the guidelines, but judges have been "remarkably restrained in exercising their discretion." *Id.* at 1681.

Most importantly for Ex Post Facto Clause analysis, sentencing *above* the Guidelines range remains exceedingly rare. Overall, only 1.8% of all defendants sentenced in 2011, and only 2.3% of fraud defendants, were punished more harshly than the Guidelines suggest. 2011 SOURCEBOOK, *supra*, tbls. N & 27. Those departures did not exceed the Guidelines maximums by much: in 2011, the median increase above the Guidelines maximum was 12 months for all offenses and fraud offenses. *Id.* tbl. 32, 32A, 32B, 32C. Thus, absent an amendment to the applicable Guidelines, a defendant is highly likely to receive a sentence at or below the sentencing range provided by the Guidelines in effect at the time of the offense. He would rarely receive a sentence 24 months above that range, as Mr. Peugh did here. A Guidelines amendment that increases the sentencing

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[10] *Compare* James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before And After The Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 271 (1999) ("the expected difference between two typical judges in the average sentence length was about 17 percent (or 4.9 months) in 1986–87 prior to the Guidelines") *with* Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 10 (2010) (noting variance post-*Gall* of 8 to 13%).

range is highly likely to increase the defendant's ultimate punishment.

Finally, the appellate substantive reasonableness review mandated by *Booker* and *Rita* continues to exert pressure on district courts to sentence within the Guidelines range. Defendants appeal the reasonableness of a sentence frequently, in more than 40% of sentencing appeals. UNITED STATES SENTENCING COMM'N, 2011 ANNUAL REPORT, at 42 (2012). Because within-range sentences may be presumed reasonable, *Rita*, 551 U.S. at 347, and greater departures may face greater appellate scrutiny, *Gall*, 552 U.S. at 50, district judges have incentives to play it safe by sentencing within or close to Guidelines ranges. A database of post-*Gall* decisions confirms this deterrent effect: of 38 substantive-reasonableness reversals, only 5 were within the Guidelines range, with 23 falling below and 10 above the range. Sentencing Resource Counsel of Federal Public and Community Defenders, *Appellate Decisions After* Gall (Sept. 27, 2012), *available at* http://tinyurl.com/app-ct-decisions-list. In other words, even though the majority of sentences handed down by the district courts are within the Guidelines range, the available evidence indicates that only a small minority of substantive reversals identified were of sentences within the Guidelines range. This mismatch sends a message to the district court judge: he or she can minimize the chances of reversal by sentencing within the Guidelines range.

3. Advisory Guidelines Also Increase The Risk Of Increased Punishment By Influencing Plea Bargains.

Guidelines amendments that generate harsher Guidelines sentencing ranges increase the risk of increased punishment by a second mechanism: namely, their effect on plea bargains. Just as they do in sentencing, Guidelines sentencing ranges function as mental anchors that frame plea bargaining "by establishing clear baselines for likely sentences after trial." Stephanos Bibas, *Plea Bargaining Outside The Shadow Of Trial*, 117 HARV. L. REV. 2463, 2533 (2004). The retroactive application of harsher Guidelines affects not only the decision to plead guilty, but also the offenses and conduct to which the defendant will admit and the sentence that the prosecutor will recommend.

Here, application of the 1998 Guidelines could have affected the Government's strategy with regard to plea offers. It could also have influenced Mr. Peugh's decision to plead not guilty to all counts, nearly half of which eventually resulted in acquittals, even in the face of his co-defendant Mr. Hollewell's decision to plead guilty to one count and escape prosecution on the remaining counts. Pet. App. at 3a, 5a, 6a. Harsher Guidelines inexorably increase the risk that defendants will receive and serve greater sentences of imprisonment than they would have under more lenient Guidelines. *See Lynce*, 519 U.S. at 440 (noting that one of the purposes of the Ex Post Facto Clause is to protect "the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment").

4. The Seventh Circuit's *Demaree* Decision Is An Aberration That Contradicts This Court's Ex Post Facto Clause Precedents.

Every court of appeals to apply the *Garner/Morales* significant-risk standard has found that post-offense increases to the post-*Booker* Guidelines violate the Ex Post Facto Clause.[11] The lone court to find to the contrary—the Seventh Circuit in *Demaree* and subsequent cases, including the decision below—did so only by declining to follow this Court's *Garner/Morales* standard. The *Demaree* court noted that "[t]he test of an *ex post facto* law has been variously stated by the Supreme Court" to include whether it "impos[es] a significant risk of enhanced punishment." 459 F.3d at 794. Such a standard, *Demaree* acknowledged, would be satisfied

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[11] *See Turner*, 548 F.3d at 1098–1100 (citing *Miller v. Florida*, 482 U.S. 423, 424, 432, 435 (1987)); *United States v. Ortiz*, 621 F.3d 82, 86–87 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1813 (2011); *United States v. Lewis*, 606 F.3d 193, 199 (4th Cir. 2010); *United States v. Lanham*, 617 F.3d 873, 889–90 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 2443 (2011); *Wetherald*, 636 F.3d at 1322; *see also United States v. Wood*, 486 F.3d 781, 790 (3d Cir. 2007); *United States v. Forrester*, 616 F.3d 929, 946 (9th Cir. 2010). Other courts have expressed agreement with the majority rule in dicta. *See United States v. Carter*, 490 F.3d 641, 643 (8th Cir. 2007); *United States v. Anderson*, 570 F.3d 1025, 1034 n.7 (8th Cir. 2009); *United States v. Thompson*, 518 F.3d 832, 869–70 (10th Cir. 2008). The First Circuit has avoided the constitutional question by devising a "commonsense protocol" that requires sentencing courts "to use the old version if the new one raises ex post facto concerns," thereby giving defendants the benefit of the more lenient Guidelines. *United States v. Rodriguez*, 630 F.3d 39, 42 (1st Cir. 2010).

by "even voluntary sentencing guidelines, for official guidelines even if purely advisory are bound to influence judges' sentencing decisions." *Id.*

Demaree offered three reasons for not applying *Garner* and *Morales*. First, it suggested that the significant-risk standard would throw open the floodgates to challenges to a series of hypothetical claims: Congress could pass resolutions exhorting judges to impose heavier sentences. The President could nominate and the Senate could confirm tough-on-crime judges. Or Congress could appropriate more money for federal prisons to reduce overcrowding and so encourage longer sentences. 459 F.3d at 794. The first two hypotheticals, however, do not involve any "Law . . . passed" by Congress. U.S. CONST. art. I, § 9, cl. 3. None of *Demaree*'s hypotheticals involves a substantive law governing crime and punishment, or even a criminal procedure. And none of these hypotheticals creates more than a "speculative, attenuated risk of affecting a prisoner's actual term of confinement." *Morales*, 514 U.S. at 508–09.

Second, the *Demaree* court held that sentences beyond the Guidelines range face no greater review than those within it. According to *Demaree*, sentencing courts need not give reasons for rejecting the Guidelines range. 459 F.3d at 794–95. A judge's "choice of sentence, whether inside or outside the guideline range, is discretionary and subject therefore to only light appellate review." *Id.* at 795 (citing Seventh and Eighth Circuit precedents). *Demaree*, decided in 2006, thus failed to predict this Court's 2007 decisions in *Rita* and *Gall*. The former case authorized appellate courts to presume that within-Guidelines sentences are reasonable, 551 U.S.

at 347; the latter required district courts to explain deviations and face more searching appellate review of larger deviations, 552 U.S. at 50. *See also Kimbrough*, 552 U.S. at 109 (suggesting "closer review" of variances based "solely on the judge's view" that the Guidelines sentencing range fails to satisfy § 3553(a)'s objectives). Those decisions undercut *Demaree*'s predicates that appellate review is "light" and that the Guidelines merely "nudg[e] [district judges] toward the sentencing range." 459 F.3d at 795.

Third, *Demaree* reasoned that applying the Ex Post Facto Clause "would have in the long run a purely semantic effect." 459 F.3d at 795. "Instead of purporting to apply the new guideline," district courts would cloak their true reasons, claiming that they were simply "tak[ing] advice from the Sentencing Commission." *Id.* But *Demaree*'s cynicism about judicial candor is at odds with the reason-giving requirement at the heart of the SRA and meaningful appellate review. 18 U.S.C. § 3553(c) (requiring statement of reasons for imposing a sentence); *Rita*, 551 U.S. at 350 ("The judges will set forth their reasons"); *Gall*, 552 U.S. at 50.

Rather than resolve the case on the significant-risk standard, as it was bound to do, the *Demaree* court focused instead on the discretion of the sentencing judge. "His choice of sentence, whether inside or outside the guideline range, is discretionary." 459 F.3d at 794. "The applicable guideline nudges him toward the sentencing range, but his freedom to impose a reasonable sentence

outside the range is unfettered." *Id.*[12] But, as this Court noted in *Garner*, "[t]he presence of discretion does not displace the protections of the Ex Post Facto Clause." *Garner*, 529 U.S. at 253. The Seventh Circuit's *Demaree* decision conflicts with this Court's precedents in *Garner* and *Morales* and carries no weight.

5. *Miller v. Florida* Supports Finding An Ex Post Facto Clause Violation Here.

This Court's only precedent analyzing sentencing guidelines under the Ex Post Facto Clause militates in favor of reversing the judgment below. In *Miller v. Florida*, this Court held that retroactive application of post-offense sentencing guidelines that result in a longer presumptive sentencing range violates the Ex Post Facto Clause. 482 U.S. at 435–36. Under the Florida sentencing guidelines system, a sentencing judge could depart from the presumptive guidelines

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[12] *Demaree* also involved very different facts. In that case, the district court had sentenced the defendant to 30 months, squarely within the 27 to 33 month Guidelines sentencing range in effect at the time of sentencing. It had stated on the record, however, that the defendant's sentence under the more lenient Guidelines in effect at the time of the offense (18 to 24 months) would have been an upward deviation to 27 months. 459 F.3d at 792–93. This case involves no comparable express determination by the sentencing court that, if the more lenient Guidelines range had applied, the defendant's sentence should have exceeded that range. Moreover, the minimal three-month difference between Ms. Demaree's sentence under the competing sets of Guidelines at issue limited the impact of the court's decision. In Mr. Peugh's case, the choice of which Guidelines to apply results in a sentencing differential of 33 to 41 months.

range upon giving clear and convincing reasons for doing so. *Id.* at 424–26. Florida argued that a sentencing judge's discretion to deviate from the Florida sentencing guidelines eliminated any Ex Post Facto Clause difficulties. *See* Br. for Respondent, *Miller v. Florida*, No. 86-5344, 1987 WL 880240, at *22–23 (U.S. Feb. 12, 1987) ("In light of the fact that the guidelines are discretionary . . . amendments to the guidelines and their application to the Petitioner was not violative of the ex post facto clause."). This Court unanimously rejected that argument. It found that the Florida sentencing guidelines "directly and adversely affect[ed] the sentence petitioner receives." 482 U.S. at 435. Even though sentencing judges could make appropriate findings and ultimately deviate from the guidelines range, they could not lightly disregard that range. *Id.* Thus, applying those sentencing guidelines retroactively violated the Ex Post Facto Clause. *Id.*[13]

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[13] In opposing certiorari in this case, the government argued that the Sentencing Guidelines resemble the U.S. Parole Commission's guidelines, which *Miller* suggested "simply provide flexible 'guideposts' for use in the exercise of discretion." 482 U.S. at 435; Opp. 5. But the U.S. Parole Commission had "'unfettered discretion'" to follow these "flexible 'guideposts'" or not. 482 U.S. at 435 (first quotation from S. Rep. No. 98-225, at 38 (1983)). By contrast, the U.S. Sentencing Guidelines, like the Florida guidelines, "ha[ve] the force and effect of law." *Id.* They erect a "hurdle that must be cleared before discretion can be exercised," albeit not as "high" a hurdle as the Florida guidelines. *Id.* And the U.S. Sentencing Guidelines, like the Florida guidelines and unlike the parole guidelines, "directly and adversely affect the sentence [a defendant] receives." *Id.*; *supra* Section B.5.

Although *Miller* was decided under the disadvantage-to-the-defendant standard later abandoned in *Collins*, 497 U.S. at 41; *Morales*, 514 U.S. at 506 n.3, the analysis in *Miller* would have led to the same result under the *Garner/Morales* significant-risk standard. Applying harsher mandatory Guidelines that curtail a court's sentencing discretion unquestionably creates a significant risk of increased punishment.[14] But, as shown *infra* at Section C, the practical operation of the federal advisory Guidelines system creates similar risks. *Miller*'s holding that presumptive post-offense Guidelines violate the Ex Post Facto Clause

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[14] If the Sentencing Guidelines were still mandatory, *Miller* would be controlling authority and would compel reversal of the court of appeals. *See Kimbrough* 542 U.S. at 116 (Thomas, J., dissenting) (resolving "to apply the statute as written, including 18 U.S.C. § 3553(b), which makes the Guidelines mandatory"); *Gall* 552 U.S. at 61 (Thomas, J., dissenting). Indeed, addressing the mandatory Guidelines system before *Booker*, the federal courts of appeals uniformly held that the Ex Post Facto Clause prohibits application of harsher post-offense Guidelines amendments. *See United States v. Harotunian*, 920 F.2d 1040, 1041–42 (1st Cir. 1990); *United States v. Gonzalez*, 281 F.3d 38, 45 (2d Cir. 2002); *United States v. Lennon*, 372 F.3d 535, 539 (3d Cir. 2004); *United States v. Morrow*, 925 F.2d 779, 782–83 (4th Cir. 1991); *United States v. Suarez*, 911 F.2d 1016, 1021–22 (5th Cir. 1990); *United States v. Holmes*, 975 F.2d 275, 278 (6th Cir. 1992); *United States v. Coe*, 220 F.3d 573, 578 (7th Cir. 2000); *United States v. Frank*, 354 F.3d 910, 926 (8th Cir. 2004); *United States v. Garcia-Cruz*, 40 F.3d 986, 987 (9th Cir. 1994); *United States v. Mondaine*, 956 F.2d 939, 942-43 (10th Cir. 1992); *United States v. Yeager*, 331 F.3d 1216, 1224 n.2 (11th Cir. 2003); *United States v. Lam Kwong-Wah*, 924 F.2d 298, 304 (D.C. Cir. 1991).

does not preclude the possibility that advisory Guidelines (as crafted by *Booker*) would as well.

Ex Post Facto Clause violations always turn on the objective effect of the amended law. *See Lynce*, 519 U.S. at 442–45 (discussing cases rejecting subjective evaluations). They are always necessarily "a matter of 'degree.'" *Morales*, 514 U.S. at 509. There is no "single 'formula' for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition." *Id.* (quoting *Beazell*, 269 U.S. at 171). Here, trial courts must calculate and consider Guidelines sentencing ranges and give substantial reasons for deviating from the ranges, particularly for significant deviations. Appellate courts review sentences for substantive reasonableness, and may presume that within-Guidelines sentences are reasonable. All of these legal rules create a significant risk that increased Guidelines will lead to increased punishment. While district courts have discretion to reject Guidelines sentencing ranges (provided they can advance justifications that will convince appellate courts of the reasonableness of their sentences), they do so infrequently. The constitutional question turns not on rare events but on "significant risk[s]."

C. *Application Of The 2009 Guidelines Greatly Increased Mr. Peugh's Sentence, In Violation Of The Ex Post Facto Clause.*

The foregoing analysis shows that the 2009 Guidelines, "as applied to [Mr. Peugh's] own sentence ... created a significant risk of increasing his

punishment." *Garner*, 259 U.S. at 255. But here there is more than risk. The sentencing transcript reveals that the harsher 2009 Guidelines caused the district court to impose a sentence on Mr. Peugh that was much heavier than it would have been under the 1998 Guidelines. Here, the district court sentenced Mr. Peugh to 70 months' imprisonment, at the very bottom of the 2009 Guidelines range. That choice indicates that Mr. Peugh merited the lowest punishment typically imposed for this type of offense and offender.[15] While the district court had some discretion to deviate from the 2009 Guidelines, in fact the court explicitly relied upon them. Acknowledging that it was free to apply "its own penal philosophy," the district court stated:

> [T]he Seventh Circuit has cautioned that as a matter of prudence and in recognition of the Commission's knowledge, experience, and staff resources, an individual judge should think long and hard before substituting his personal penal philosophy for that of the Commission.
>
> Here the Court does not disagree with the policy implicit in Section 2B1.1 of imposing increasingly stricter punishments on defendants that cause

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[15] District courts sentence at the bottom of the applicable Guidelines range in a remarkable 50.7% of cases within the Guidelines ranges, *see* 2011 SOURCEBOOK, *supra*, tbl. 29. That is further evidence of how that range creates an anchor that influences sentencing.

> increasingly larger amounts of loss. . . . I am not convinced this general policy should be disregarded in this particular case.

J.A. 94. After rejecting Mr. Peugh's arguments for a downward variance, the district court further declared that it would defer to the 2009 Guidelines range:

> Here the loss amount exceeded $2.5 million, which resulted in an 18-level enhancement. However, when considering that the base offense level is only seven and considering the particular facts of this case, the court does not disagree with the policy of imposing a stricter punishment on defendants that cause significant amounts of loss. Accordingly, the court will give the *amount of loss calculations and the resulting advisory guidelines range the appropriate amount of deference in this case.*

J.A. 96 (emphasis added).

The same "general policy" of "imposing increasingly stricter punishments on defendants that cause increasingly larger amounts of loss" in § 2B1.1 of the 2009 Guidelines was also present in § 2F1.1 of the 1998 Guidelines. The only relevant intervening changes were the increase in the base offense levels and the increased enhancement levels for this particular amount of loss. The district court deferred to these changes without independent analysis. *See*

J.A. 96. In relying on the 2009 Guidelines, the district court imposed a longer sentence upon Mr. Peugh than it would have imposed under the 1998 Guidelines. The district court decided to impose a sentence at the lowest end of the 2009 Guidelines range. If the court had instead applied the 1998 Guidelines, it is highly unlikely that it would have found compelling justifications for imposing a sentence that would have been 50% higher (and two years greater) than the upper limit of the Guidelines range.

Mr. Peugh is thus serving a sentence of nearly six years, rather than a sentence of between three and four years, solely because the court applied the harsher 2009 Guidelines retroactively. Those retroactively applied Guidelines at a minimum created a significant risk that Mr. Peugh would receive a longer sentence. Applying those increases retroactively contravened the Ex Post Facto Clause.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 12-62

In the Supreme Court of the United States

MARVIN PEUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Ex Post Facto Clause required the district court to consult the version of the advisory Sentencing Guidelines in effect at the time of petitioner's offenses, rather than the version in effect at the time of sentencing, in determining the appropriate sentence under 18 U.S.C. 3553(a).

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In the Supreme Court of the United States

No. 12-62

MARVIN PEUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 675 F.3d 736.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2012. On June 13, 2012, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 10, 2012, and the petition was filed on July 16, 2012. The petition was granted on November 9, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND SENTENCING GUIDELINES INVOLVED

The relevant constitutional provisions and statutes are reprinted in an appendix to this brief. App., *infra*,

1a-3a. Relevant Sentencing Guidelines and amendments are reprinted at Pet. App. 44a-68a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on five counts of bank fraud, in violation of 18 U.S.C. 1344. Pet. App. 15a. The district court sentenced petitioner to 70 months of imprisonment, to be followed by three years of supervised release. *Id.* at 17a-18a. The court of appeals affirmed. *Id.* at 1a-13a.

1. Petitioner and his cousin were co-owners of two farming-related companies: the Grainery, Inc., which bought, sold, and stored grain; and Agri-Tech, Inc., which provided farming services to landowners and tenants. Pet. App. 2a. In 1999 and 2000, after the Grainery began to suffer cash-flow problems, petitioner and his cousin engaged in multiple fraudulent schemes to obtain additional capital. *Id.* at 2a-3a.

First, the two men secured loans, worth over $2.5 million, from the State Bank of Davis by falsifying the existence of valuable contracts for future grain deliveries from Agri-Tech to the Grainery. Pet. App. 2a-3a; J.A. 31-32. They never paid back most of the principal on those loans, causing losses of over $2 million. J.A. 32. Second, petitioner and his cousin artificially inflated the balances of certain bank accounts through a form of fraud known as "check kiting," in which they wrote bad checks between their personal and business accounts in order to trick the banks into thinking the receiving accounts had more funds. Pet. App. 3a; J.A. 119-120. That deception allowed them to overdraw an account with Savanna Bank by $471,000. Pet. App. 3a.

2. In 2009, a grand jury in the Northern District of Illinois charged petitioner in a superseding indictment with nine counts of bank fraud, in violation of 18 U.S.C. 1344. J.A. 114-118. The first three counts concerned the fraudulent contracts used to secure the loans, and the latter six counts concerned the check-kiting scheme. *Ibid.* At trial, the government offered substantial evidence of petitioner's frauds. Pet. App. 3a-4a. Petitioner testified in his own defense and denied any wrongdoing, offering testimony that conflicted with other witnesses'. *Id.* at 4a-5a. The jury convicted petitioner on one of the three loan-fraud counts and four of the five check-kiting counts, and it acquitted him of the remaining counts. *Id.* at 5a; J.A. 118.

3. a. Petitioner was sentenced in May 2010. J.A. 28-106. Pursuant to 18 U.S.C. 3553(a), a sentencing court's "overarching duty" is to impose a "'sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in [18 U.S.C.] 3553(a)(2)." *Pepper* v. *United States*, 131 S. Ct. 1229, 1242 (2011) (quoting 18 U.S.C. 3553(a)). In carrying out that responsibility, the court is to consult a variety of factors, including the Sentencing Guidelines promulgated by the United States Sentencing Commission. *Id.* at 1241. Since *United States* v. *Booker*, 543 U.S. 220 (2005), those Guidelines have been advisory, not mandatory: "although a sentencing court must 'give respectful consideration to the Guidelines, *Booker* permits the court to tailor the sentence in light of other statutory concerns as well.'" *Pepper*, 131 S. Ct. at 1241 (quoting *Kimbrough* v. *United States*, 552 U.S. 85, 101 (2007)).

Federal law generally requires courts to consult the advisory Guidelines range "in effect on

the date the defendant is sentenced." 18 U.S.C. 3553(a)(4)(A)(ii). Congress adopted that approach so that sentencing courts would have the benefit of the Commission's up-to-date views about appropriate sentencing ranges. See S. Rep. No. 225, 98th Cong., 1st Sess. 77 (1983) (*Senate Report*). In a pre-*Booker* provision adopted when the Guidelines were mandatory, the Commission has specified that "[i]f the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." Sentencing Guidelines § 1B1.11(b)(1) (2009).

b. Consistent with Section 3553(a)(4)(A)(ii), the presentence investigation report (PSR) prepared for petitioner's sentencing used the then-current 2009 version of the Sentencing Guidelines to calculate the advisory sentencing range. J.A. 123. The PSR determined that petitioner's base offense level was seven and added an 18-level enhancement because petitioner's fraud caused more than $2.5 million in losses, producing a total offense level of 25. J.A. 124-126; see Sentencing Guidelines §§ 2B1.1(a)(1), 2B1.1(b)(1)(J) (2009). That offense level, combined with petitioner's criminal history category of I, yielded an advisory Guidelines range of 57 to 71 months of imprisonment. J.A. 144. The PSR additionally informed the district court that the Guidelines in effect at the time of the offenses would have produced a total offense level of 19 and an advisory range of 30 to 37 months. J.A. 124, 148.

Petitioner objected to the PSR's Guidelines calculation, arguing (among other things) that use of the 2009 Guidelines to calculate his advisory range violated the Ex Post Facto Clause. 3:08-cr-50014 Docket entry No. 156, at 1-2 (N.D. Ill. Apr. 2, 2010). The district court rejected that argument, observing that, under governing circuit precedent, "a post-offense change in an advisory guidelines range does not create an ex post facto violation." J.A. 30 (citing *United States* v. *Demaree*, 459 F.3d 791 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007)). The court also overruled petitioner's other objections to the PSR's Guidelines calculation. J.A. 30-38.

The district court then agreed with the government that petitioner's offense level under the Guidelines should receive an additional two-level obstruction-of-justice enhancement, because petitioner had given perjured testimony at trial. JA. 38-42. This increased petitioner's offense level under the 2009 Guidelines to 27, resulting in an advisory sentencing range of 70 to 87 months. J.A. 42. Under the Guidelines in effect at the time of his offenses, the offense level would have been 21, resulting in an advisory range of 37 to 46 months. See JA. 124; Pet. App. 48a.

c. After calculating the Guidelines range, the district court turned to the "other 3553(a) considerations." J.A. 42. The court heard testimony from petitioner's minister and petitioner's wife, argument from counsel, and an allocution from petitioner. J.A. 43-87. It ultimately determined that "a sentence sufficient but not greater than necessary to comply with the purpose set forth in paragraph two of Section 3553(a)" was 70 months of imprisonment followed by three years of supervised release. J.A. 100. The court em-

phasized that, in arriving at that determination, it had considered not only the Guidelines but also "all of the other sentencing factors contained in Section 3553(a)," as well as "the presentence report and accompanying materials," "the arguments made by the government and [petitioner]," "the evidence that's been presented," and "[petitioner's] statement." J.A. 87-88.

The district court concluded that the "nature and circumstances of the offense indicate the need for a strong sentence, not a more lenient one." J.A. 93; see 18 U.S.C. 3553(a)(1) (sentencing court should consider "the nature and circumstances of the offense"); see also 18 U.S.C. 3553(a)(2)(A) (sentence should "reflect the seriousness of the offense," "promote respect for the law," and "provide just punishment for the offense"). The court found that petitioner "took a leadership role" in the loan fraud, JA. 88; perpetrated an "elaborate scheme" that "occurred over an extended period of time," *ibid.*; and "caused a loss of over 2.5 million to the banks that were unfortunate enough to do business with him," J.A. 93. The court also observed that "rather than owning up to his wrongdoing," petitioner "compounded his criminal activity by employing the check kiting scheme to keep the business afloat," thereby "knowingly put[ting] various banks at risk of losing substantial amounts of money." *Ibid.*

The district court noted several factors that might favor mitigating the sentence, including petitioner's history of "steady employment," his lack of prior arrests, and the strong family and community support evidenced by "numerous letters" describing petitioner's personal qualities. J.A. 88-89; 18 U.S.C. 3553(a)(1) (sentencing court should consider "the

history and characteristics of the defendant"). The court further noted that petitioner had "endured much public scrutiny and professional discredit" and that the loss amount was barely above the amount needed for an 18-level increase in the Guidelines calculation. J.A. 89. The court also saw "little need to protect the public from further crimes" that petitioner might commit. J.A. 91; see 18 U.S.C. 3553(a)(2)(C) (sentence should "protect the public from further crimes of the defendant"). But the court did see a "great and urgent need for the sentence in this case to be a general deterrence to other people that might be in a position to or consider doing these kinds of offenses." J.A. 90-91; see 18 U.S.C. 3553(a)(2)(B) (sentence should "afford adequate deterrence to criminal conduct").

The district court "carefully considered" and expressly addressed several specific arguments raised by petitioner in favor of a below-Guidelines sentence. J.A. 91. It stressed that, in doing so, it was "mindful of all the Section 3553(a) factors." *Ibid.* First, the court rejected petitioner's contention that "his fraud was not driven by desire for profit or for personal gain," finding that if the Grainery had "done well," petitioner "would have profited by that success." J.A. 91-93. Second, the court rejected petitioner's contention that "the fraud guidelines rely too much on the amount of loss in determining the advisory sentencing range." J.A. 93-96. The court recognized that "a sentencing judge can have his own penal philosophy at variance with that of the Sentencing Commission," although it noted that circuit precedent "has cautioned that as a matter of prudence and in recognition of the Commission's knowledge, experience, and staff resources, an individual judge should think long and

hard before" doing so. J.A. 94. Here, "considering the particular facts of this case," the court "d[id] not disagree with the policy of imposing a stricter punishment on defendants that cause significant amounts of loss," and thus decided to give the "advisory guidelines range the appropriate amount of deference" on that issue. J.A. 96.

Third, the district court agreed with petitioner that his age (56) and lack of prior criminal history made it unlikely that he would commit additional crimes, but found that those considerations were outweighed by "other Section 3553(a) considerations, including the seriousness of the offense and the need for general deterrence," which was "high in a case such as this one." J.A. 96-97. Fourth, the court disagreed with petitioner's characterization of his offenses as "aberrant behavior in an otherwise law-abiding life," observing that his "criminal conduct * * * was drawn out over a long period of time." J.A. 98. Fifth, the court found that a lower sentence would not significantly help to provide restitution to the victims of petitioner's crimes, because petitioner was unlikely ever to be able to make those victims whole. J.A. 98-99; see 18 U.S.C. 3553(a)(7) (sentencing court should consider "the need to provide restitution to any victims of the offense"). Finally, the court found that any disparity between petitioner's sentence and his cousin's sentence (of 12 months and a day) was "wholly warranted" because his cousin had a lesser role in the loan fraud, pleaded guilty, "acknowledged his culpability," and "did not obstruct justice by committing perjury during trial." J.A. 99; see J.A. 22; see also 18 U.S.C. 3553(a)(6) (sentencing court should consider "the need to avoid unwarranted sentence

disparities among defendants with similar records who have been found guilty of similar conduct").

4. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 1a-13a. As relevant here, that court adhered to its prior holding that "the advisory nature of the guidelines vitiates any ex post facto problem" that might otherwise arise from consulting the Guidelines in effect at the time of sentencing rather than the Guidelines in effect at the time of the offense. *Id.* at 8a-9a (citing *Demaree*, 459 F.3d at 795).

SUMMARY OF ARGUMENT

The Ex Post Facto Clause prohibits Congress from enacting an "ex post facto Law." U.S. Const. Art. I, § 9, Cl. 3. It does not prohibit a district court from considering the Sentencing Commission's most up-to-date, non-binding advice about best practices in federal sentencing.

A. The Ex Post Facto Clause was adopted in reaction to English parliamentary abuses that retroactively changed the legal framework for criminal punishment, including by attaching new harsher penalties to a preexisting crime. Updated advisory recommendations that inform a court's exercise of sentencing discretion lack two critical features of an ex post facto law: they do not "change[] the *legal* consequences of acts completed before [their] effective date," *Miller* v. *Florida*, 482 U.S. 423, 430 (1987) (emphasis added; citation omitted), and they do not "increase[] the penalty by which a crime is punishable," *California Dep't of Corr.* v. *Morales*, 514 U.S. 499, 506 n.3 (1995). The government is unaware of any case in which this Court has applied the Ex Post Facto Clause to advisory provisions. To the contrary, in holding that binding

sentencing provisions that establish presumptive sentencing ranges are subject to the Ex Post Facto Clause, this Court distinguished non-binding regulatory parole guidelines that "simply provide flexible 'guideposts' for use in the exercise of discretion." *Miller*, 482 U.S. at 435.

B. The federal Sentencing Guidelines are exactly that sort of flexible-guidepost system. This Court explained in *United States* v. *Booker*, 543 U.S. 220 (2005), that imbuing the Guidelines with "the force and effect of laws" leads to Sixth Amendment violations in many of their applications. *Id.* at 234. The Court then cured the constitutional infirmity of the then-mandatory Guidelines system by severing certain statutory provisions in order to "make the Guidelines system advisory." *Id.* at 246.

Under the post-*Booker* framework, the Guidelines are one advisory factor that a district court must consider in selecting a sentence "sufficient, but not greater than necessary" to carry out Congress's general statutory sentencing goals. 18 U.S.C. 3553(a). In making that discretionary sentencing decision, the district court can and should consider information that post-dates the offense itself, such as evidence of the defendant's post-offense rehabilitation or recidivism. It may similarly consider post-offense penological data and sentencing-policy perspectives.

The Guidelines essentially synthesize information—mainly, sentences imposed by other courts and policy recommendations—that courts would already consider in deciding upon an appropriate sentence in a particular case. Petitioner accordingly acknowledges that a court may, consistent with the Ex Post Facto Clause, elect on its own to consult the most

recent version of the Guidelines, even if that version of the Guidelines recommends a higher sentence than the version at the time of the offense.

A district court's consultation of up-to-date Guidelines does not become an ex post facto violation simply because that consultation is required by Section 3553(a). Under Section 3553(a), the Guidelines remain "advisory only." *Kimbrough* v. *United States*, 552 U.S. 85, 91 (2007). This Court's holdings make clear that district courts may reject the recommendation provided by the Guidelines, based on either a generalized disagreement with the policy they express or a more particularized disagreement with the result they would suggest in a particular case. District courts cannot presume that a Guidelines-range sentence is appropriate; the justifications for a sentence different from the Guidelines range need not be proportional to the extent of the difference; and courts of appeals must apply the same deferential abuse-of-discretion review to all sentences, whether inside, just outside, or far outside the advisory Guidelines range.

The Ex Post Facto Clause's purposes—to provide adequate notice to defendants and to prevent legislative action that disfavors particular persons—are not implicated by changes to the Guidelines. As to notice, this Court has held that, under the now-advisory Guidelines, a defendant has no constitutionally protected expectation under the Due Process Clause of receiving any particular sentence within the range authorized by statute. It necessarily follows that the defendant has no constitutionally protected expectation under the Ex Post Facto Clause about the precise advice the judge will consider in deciding what sentence to impose. As to legislative targeting, the

Guidelines, while subject to congressional direction, in the main reflect the empirical and policy expertise of an independent agency located within the Judicial Branch. And, critically, the Guidelines will affect sentences in individual cases only to the extent that Article III sentencing judges independently agree with them.

C. Petitioner would approach the ex post facto question by asking whether the advisory Guidelines exert sufficient "influence" on judges' decisionmaking that an increase in the recommended Guidelines range creates a "significant risk" of a higher sentence. Pet. Br. 20. Contrary to petitioner's suggestion, this Court's decision in *Garner* v. *Jones*, 529 U.S. 244 (2000), does not endorse such a subjective inquiry into the susceptibility of judges to influence from advice. The ex post facto analysis in *Garner* instead focused on whether a binding legal rule had the effect of constraining the exercise of sentencing discretion. A similar analysis here leads to the conclusion that the Guidelines, which are neither binding legal rules nor constraints on a sentencing court's discretion, do not trigger the Ex Post Facto Clause.

Petitioner nevertheless urges the Court to infer an ex post facto problem with the Guidelines from national sentencing data showing that district courts often—but far from always—impose sentences within or near the advisory Guidelines range. But the advisory Guidelines do not raise ex post facto concerns simply because district courts find them to be good advice. To the extent that petitioner would read the data as showing that district courts are treating the Guidelines as a significant constraint on their sentencing discretion, he effectively asserts that the district

courts are disregarding this Court's *Booker* line of cases, under which the judge "may not presume that the Guidelines range is reasonable." *Gall* v. *United States*, 552 U.S. 38, 50 (2007).

If a district court gives the Guidelines undue weight in a particular case, the defendant may raise an individualized claim of statutory error. *Nelson* v. *United States*, 555 U.S. 350, 352 (2009) (per curiam) (summarily reversing on that basis). Petitioner, however, has never raised such a claim, and his far-reaching statistical ex post facto argument is an inappropriate substitute. His approach is also impracticable. The statistical likelihood that a defendant will receive a sentence within the Guidelines range varies greatly depending on the particular Guideline at issue and the particular judicial district in which the defendant is sentenced. An ex post facto approach based on an undifferentiated aggregation of sentencing data thus overlooks the individualized nature of sentencing. And because *Booker* already requires, as a statutory matter, that each individual sentence be the product of independent judicial discretion rather than rote adherence to the Guidelines, such sentences do not warrant separate examination under the Ex Post Facto Clause.

ARGUMENT

THE EX POST FACTO CLAUSE PERMITS A COURT TO CONSIDER THE MOST CURRENT ADVISORY GUIDELINES RANGE AS A FACTOR IN ITS EXERCISE OF SENTENCING DISCRETION UNDER 18 U.S.C. 3553(a)

Under 18 U.S.C. 3553(a), the Sentencing Guidelines inform a district court's sentencing discretion; they do not legally constrain its exercise. The district court's legal obligation is to impose a sentence, in light of all

the statutory considerations, that is sufficient but not greater than necessary to achieve the purposes of sentencing enumerated in Section 3553(a)(2). Advisory Guidelines cannot override that legal obligation. The Commission's recommendation of a higher sentence than the advisory Guidelines recommended at the time of the defendant's offense accordingly does not raise ex post facto concerns.

A. Non-Binding Provisions That Inform The Exercise Of Sentencing Discretion Are Not Ex Post Facto Laws

An advisory provision that informs, but does not control, the exercise of sentencing discretion differs from the traditional definition of a punishment-related ex post facto law in two critical ways: it is not a binding legal enactment, and it cannot be understood as increasing the previously prescribed penalty for an offense. This Court has distinguished provisions that merely provide guidance for the exercise of discretion from binding sentencing provisions that trigger ex post facto concerns.

1. The federal Constitution prohibits both Congress and the States from enacting any "ex post facto Law." U.S. Const. Art. I, § 9, Cl. 3; see U.S. Const. Art. I, § 10, Cl. 1. Although the Constitution itself does not define the phrase "ex post facto Law," this Court has explained that it "was a term of art with an established meaning at the time of the framing of the Constitution." *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990). The Court has accordingly looked to history, and its own precedents, for guidance in assessing whether a challenged provision falls within the constitutional prohibition. See, *e.g.*, *Carmell* v. *Texas*, 529 U.S. 513, 521-530 (2000); see also *Dobbert* v. *Florida*, 432 U.S. 282, 292 (1977) ("Our cases have not attempt-

ed to precisely delimit the scope of this Latin phrase, but have instead given it substance by an accretion of case law.").

Laws resulting in "increased punishments" for preexisting offenses "are not mentioned explicitly in the historical sources" that the Framers presumably consulted in drafting the Ex Post Facto Clause. *Youngblood*, 497 U.S. at 44. This Court has nevertheless adopted the broader definition of ex post facto laws in Justice Chase's seminal opinion in *Calder* v. *Bull*, 3 U.S. (Dall.) 386 (1798). See, *e.g.*, *Carmell*, 529 U.S. at 513 (citing cases that have adopted Justice Chase's definition). Justice Chase listed, as one of the four categories of ex post facto laws, a "law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed." *Calder*, 3 U.S. at 390; see *ibid.* (also listing a "law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action"; a "law that *aggravates a crime*, or makes it *greater* than it was, when committed"; and a "law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*").

The sole example that Justice Chase identified of such a punishment-increasing law was the Coventry Act, 1670, 22 & 23 Car. 2, ch. 1 (Eng.). *Calder*, 3 U.S. at 389 n.||. The Coventry Act was a parliamentary statute that (among other things) imposed certain conditions on the people who had attacked Sir John Coventry, a member of the House of Commons. Coventry Act ¶ I. Specifically, the Act provided that the

culprits should surrender themselves to the authorities on a certain day or suffer banishment; that if they returned to the country following such banishment, they would automatically be subject to a death sentence; and that they were ineligible for pardons except by specific Act of Parliament. *Id.* ¶¶ I, III-IV. As a leading legal scholar of the Founding era explained, the problem with the Coventry Act was that "the legislature" had "imposed a sentence *more severe* than could have been awarded by the inferior courts" before the Act's enactment. 2 Richard Wooddeson, *A Systematical View of the Laws of England; as Treated of in a Course of Vinerian Lectures, Read at Oxford, During A Series of years, Commencing in Michaelmas Term, 1777* at 639 (1792); see *Carmell*, 529 U.S. at 522-523 & nn.10-12 (considering Wooddeson an authoritative source on ex post facto laws).

Post-*Calder* decisions of this Court have likewise focused on legislative increases in the severity of punishment as the touchstone of a (punishment-related) ex post facto law. See, *e.g.*, *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (Marshall, C.J.) (describing an ex post facto law as "one which renders an act punishable in a manner in which it was not punishable when it was committed"); *Weaver* v. *Graham*, 450 U.S. 24, 28 (1981) (describing an ex post facto law as one "which * * * imposes additional punishment to that [previously] prescribed") (quoting *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 325-326 (1867)). The Court has recently made clear that a punishment-related law violates the Ex Post Facto Clause only if it "increases the penalty by which a crime is punishable." *California Dep't of Corr.* v. *Morales*, 514 U.S. 499, 506 n.3 (1995); see *Garner* v.

Jones, 529 U.S. 244, 255 (2000) (citing *Morales* for that proposition).

2. Consistent with the origins of the Ex Post Facto Clause as a reaction to parliamentary abuses in the enactment of laws, this Court has never, to the government's knowledge, applied the Clause to invalidate a provision that is merely advisory in nature. As the cases cited by petitioner illustrate, this Court's ex post facto cases have almost invariably concerned statutes that made a binding change in the governing legal framework.

Some of those statutes expressly authorized something that had not been authorized before. See *Carmell*, 529 U.S. at 516, 552 (ex post facto violation where statute authorized conviction based on uncorroborated testimony); *Morales*, 514 U.S. at 501-502 (no ex post facto violation where statute authorized increase in interval between parole hearings); *Youngblood*, 497 U.S. at 39 (no ex post facto violation where statute authorized reformation of improper jury verdict); *Beazell* v. *Ohio*, 269 U.S. 167, 168-171 (1925) (no ex post facto violation where statute authorized co-defendants to be tried jointly); see *Johnson* v. *United States*, 529 U.S. 694, 696 (2000) (avoiding ex post facto analysis by interpreting updated law to confer no greater authority than preexisting law). Others eliminated or limited something that had previously been available. See *Lynce* v. *Mathis*, 519 U.S. 433, 435 (1997) (ex post facto violation where statute eliminated early-release credits for prison inmates); *Weaver*, 450 U.S. at 25, 36 (ex post facto violation where statute limited availability of good-conduct credits for inmates); *Calder*, 3 U.S. at 397 (opinion of Chase, J.) (no ex post facto violation where non-penal

statute had effect of eliminating right to recover certain property); see also *Lindsey* v. *Washington*, 301 U.S. 397, 398-402 (1937) (ex post facto violation where statute replaced discretionary zero-to-15-year term of imprisonment with mandatory 15-year term). And one did a combination of the two. *Miller* v. *Florida*, 482 U.S. 423, 424-427 (1987) (ex post facto violation where statute increased the presumptive sentencing range from which sentencing court had little discretion to depart). But none involved an advisory provision.

The one case petitioner identifies (Pet. Br. 18-19) that presented an ex post facto challenge to a non-statutory provision—*Garner* v. *Jones*, *supra*—involved a parole-board rule to which the state legislature had given binding legal effect. 529 U.S. at 247 (observing that state law gave board the "authority to 'set forth . . . the times at which periodic reconsideration for parole shall take place'") (quoting Ga. Code. Ann. § 42-9-45(a) (1982)) (brackets omitted); see *id.* at 249-257 (concluding that inmate had not met his burden to show that permitting eight-year, rather than three-year, intervals between parole hearings violated the Ex Post Facto Clause). This Court has effectively incorporated the requirement that a provision make some binding change to the legal regime into its test "for determining whether a criminal law is *ex post facto*." *Miller*, 482 U.S. at 430. That test requires not only that the provision "disadvantage the offender" in a relevant way, but also that the provision "be retrospective" in the sense that it "changes the *legal* consequences of acts completed before its effective date." *Ibid.* (quoting *Weaver*, 450 U.S. at 29, 31) (emphasis added). An advisory provision, which does

not change the governing legal framework, cannot satisfy that requirement.

3. A non-binding advisory provision that informs the exercise of sentencing discretion also does not "increase[] the penalty by which a crime is punishable." *Morales*, 514 U.S. at 506 n.3. Instead, such a provision merely assists the decisionmaker in choosing among the various punishments it has always been free to impose. Contrary to petitioner's suggestion (Pet. Br. 19-20), this Court's decisions do not support the proposition that the Ex Post Facto Clause can be offended by a change in a factor that can simply "influence" a sentencing decision. See Part C.1, *infra*. Rather, the Court has identified the existence of overarching sentencing discretion as an important consideration that favors rejecting an ex post facto claim.

In *California Department of Corrections* v. *Morales*, *supra*, for example, the Court relied in part on a parole board's "broad discretion" to "tailor" its procedures based on "the particular circumstances of the individual prisoner" to conclude that a statute permitting a longer interval between parole hearings was not an ex post facto law. 514 U.S. at 511-512. The Court expanded upon that reasoning in *Garner*, where it made clear that a rule allowing for eight-year (rather than three-year) intervals between parole reconsiderations was constitutional, so long as the parole board retained and exercised discretion to deviate from the eight-year period when the case-specific circumstances suggested that an inmate deserved earlier reconsideration. 529 U.S. at 256-257.

The Court in *Garner* acknowledged that, at least with respect to parole, the "presence of discretion does not displace the protections of the *Ex Post Facto*

Clause," because one of the "danger[s]" that the Clause "guards against"—the "danger that legislatures might disfavor certain persons after the fact"—is "present even in the parole context." 529 U.S. at 253. But the Court reasoned that "to the extent there inheres in *ex post facto* doctrine some idea of actual or constructive notice to the criminal" of the penalty for his offense, "we can say with some assurance that where parole is concerned discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised." *Ibid.* "The idea of discretion," the Court explained, "is that it has the capacity, and the obligation, to change and adapt based on experience," including the availability of updated penological data. *Ibid.*

4. This Court's decision in *Miller* v. *Florida*, *supra*, reinforces, in the specific context of sentencing ranges, that a punishment-related provision violates the Ex Post Facto Clause only if it makes a binding legal change that alters the conditions under which a more lenient punishment is available. In *Miller*, a State had superimposed narrowed presumptive sentencing ranges, which took account of particularized offense-related and offender-related circumstances, atop the statutory sentencing ranges for particular crimes. 482 U.S. at 425-426. If a judge imposed a sentence within that narrower presumptive range, he did not need to give a written explanation of his reasons for selecting that sentence, and the sentence was not subject to appellate review. *Id.* at 426. At the same time, the sentencing scheme foreclosed the judge from imposing a sentence outside the presumptive range unless he could provide "clear and convincing reasons," based "on facts proved beyond a reason-

able doubt," why considerations not already accounted for in the presumptive range itself warranted a departure. *Id.* at 425-426, 432, 435.

This Court concluded that the Ex Post Facto Clause barred application of a legislative increase in a defendant's default sentencing range (from 3½ to 4½ years of imprisonment to 5½ to 7 years of imprisonment) that had taken effect only after the defendant had committed his offense. *Miller*, 482 U.S. at 424-425, 427. In reaching that conclusion, the Court emphasized that the presumptive range placed a substantial legislative constraint on the judge's exercise of sentencing discretion. *Id.* at 434-435. In particular, the Court distinguished the state scheme from the then-effective United States Parole Commission Guidelines on the ground that the state scheme imposed important legal limits on the sentences that courts could impose. *Ibid.*

The Parole Commission's Guidelines, promulgated as federal regulations, "establish[ed] a 'customary range' of confinement for various classes of offenders." *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 391 (1980). But rather than limiting the Parole Commission's authority to impose a sentence outside that range, the parole guidelines "operate[d] only to provide a framework for the Commission's exercise of its statutory discretion." *Portley* v. *Grossman*, 444 U.S. 1311, 1312 (1980) (Rehnquist, J., in chambers); see, *e.g.*, 28 C.F.R. 2.20 (1974) ("Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered. For example, cases with exceptionally good institutional program achievement [could] be considered for earlier release."). A number of court of appeals deci-

sions, in accord with an in-chambers decision by then-Justice Rehnquist, had "upheld the retrospective application of federal parole guidelines" on one of several grounds: that they were "not 'laws' for purposes of the *Ex Post Facto* Clause"; that they "merely rationalize[d] the exercise of statutory discretion"; or that they did "not result in a more onerous punishment." *Miller*, 482 U.S. at 434; see *ibid.* (citing *Portley*, 444 U.S. at 1311; *Wallace* v. *Christensen*, 802 F.2d 1539 (9th Cir. 1986) (en banc); *Yamamoto* v. *United States Parole Comm'n*, 794 F.2d 1295 (8th Cir. 1986); *Dufresne* v. *Baer*, 744 F.2d 1543 (11th Cir. 1984), cert. denied, 474 U.S. 817 (1985); *Warren* v. *United States Parole Comm'n*, 659 F.2d 183 (D.C. Cir. 1981), cert. denied, 455 U.S. 950 (1982)).

The State in *Miller* relied on the parole-guidelines decisions to argue that its scheme likewise should be seen to "'merely guide and channel' the sentencing judge's discretion," or to "operate[] only as a 'procedural guidepost' for the exercise of discretion within * * * statutorily imposed sentencing limits." 482 U.S. at 434. This Court rejected that argument, based on its determination that the state scheme did not, in fact, work that way. *Id.* at 434-435. The Court reasoned that increasing the presumptive state sentencing range "directly and adversely affect[ed] the sentence [the defendant] receives," and it stressed that such an increase would have the binding legal effect of depriving the sentencing court of discretion it had previously possessed. *Id.* at 435. The Court observed that "the revised sentencing law is a law enacted by the Florida Legislature, and it has the force and effect of law," and the Court explained that the State's presumptive sentencing ranges did not "simply provide

flexible 'guideposts' for use in the exercise of discretion," but instead "create[d] a high hurdle that must be cleared before discretion can be exercised." *Ibid.*

B. An Increase In An Advisory Federal Sentencing Guidelines Range Is Not An Ex Post Facto Law

Before *United States* v. *Booker*, 543 U.S. 220 (2005), the federal Sentencing Guidelines (unlike the former parole guidelines) were mandatory. Thus, like the presumptive sentencing ranges at issue in *Miller*, the federal Sentencing Guidelines "ha[d] the force and effect of laws," *id.* at 234, and significantly constrained sentencing courts' discretion to impose sentences outside of the Guidelines range. See 18 U.S.C. 3553(b)(1) (2000 & Supp. III 2003). Courts of appeals had therefore uniformly held that, under *Miller*, the Ex Post Facto Clause precluded sentencing a defendant under revised Guidelines that provided for a more severe sentence than was authorized by the Guidelines in effect when the defendant committed the offense. See, *e.g.*, *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994).

This Court's recent decisions explaining the role of the Guidelines in post-*Booker* sentencing, however, have made clear that the Guidelines are now only advisory and do not limit the discretion of sentencing courts in the manner that the presumptive sentencing ranges at issue in *Miller* did. The Court has underscored that the advisory Guidelines range is just one of the factors to be considered under Section 3553(a) and that the sentencing court's "overarching duty," after considering *all* of the factors, is to select a sentence that is "'sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in [18 U.S.C.] 3553(a)(2)." *Pepper* v. *United States*, 131

S. Ct. 1229, 1242 (2011) (quoting 18 U.S.C. 3553(a)). The Sentencing Commission's promulgation of new Guidelines that increase a defendant's advisory range thus neither divests the sentencing court of its discretion to impose a lower sentence nor relieves it of the obligation to do so, if its independent judgment dictates that such a sentence would be the most appropriate. An increase in an advisory Guidelines range accordingly cannot be considered an ex post facto law.

1. Seeking advice from the most current Sentencing Guidelines is consistent with the longstanding and unchallenged tradition of relying on post-offense information at sentencing

a. The selection of an appropriate sentence is quintessentially a discretionary judgment. This Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." *Booker*, 543 U.S. at 233 (citing, *inter alia*, *Williams* v. *New York*, 337 U.S. 241, 246 (1949)). And the Court has emphasized the "uniform and constant * * * federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Pepper*, 131 S. Ct. at 1239-1240 (quoting *Koon* v. *United States*, 518 U.S. 81, 113 (1996)).

In the federal system, 18 U.S.C. 3553(a) frames the sentencing process by "specifying various factors that courts must consider in exercising their discretion." *Pepper*, 131 S. Ct. at 1241. A sentencing judge has an "overarching duty under § 3553(a) to 'impose a sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in

§ 3553(a)(2)." *Id.* at 1242 (quoting 18 U.S.C. 3553(a)). Those purposes are that the sentence should "reflect the seriousness of the offense," "promote respect for the law," and "provide just punishment for the offense," 18 U.S.C. 3553(a)(2)(A); "afford adequate deterrence to criminal conduct," 18 U.S.C. 3553(a)(2)(B); "protect the public from further crimes of the defendant," 18 U.S.C. 3553(a)(2)(C); and "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," 18 U.S.C. 3553(a)(2)(D). The set of factors that the court "shall consider" in exercising its judgment about what sentence would best accomplish those purposes are "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. 3553(a)(1); "the need for the sentence imposed" to satisfy the purposes set forth in Section 3553(a)(2), 18 U.S.C. 3553(a)(2); "the kinds of sentences available"; 18 U.S.C. 3553(a)(3); "the kinds of sentence and the sentencing range" contained in the most recent version of the Sentencing Guidelines, 18 U.S.C. 3553(a)(4); "any pertinent policy statement * * * issued by the Sentencing Commission," 18 U.S.C. 3553(a)(5)(A); "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. 3553(a)(6); and "the need to provide restitution to any victims of the offense," 18 U.S.C. 3553(a)(7).

b. A court's exercise of discretion in selecting an appropriate sentence under Section 3553(a), no less than a state board's exercise of discretion with respect to parole, "has the capacity, and the obligation, to change and adapt based on experience." *Garner*, 529

U.S. at 253. A number of the Section 3553(a) factors are usefully informed by events that post-date the offense itself: for example, a defendant's post-offense behavior can shed light on the need to "protect the public from further crimes of the defendant," 18 U.S.C. 3553(a)(2)(C), and sentences imposed by other courts since the date of the offense can affect "the need to avoid unwarranted sentence disparities," 18 U.S.C. 3553(a)(6). This Court's decisions make clear that consideration of such factors need not be frozen in time, but can and should be informed by any and all information that is available at the time of sentencing. See, *e.g.*, *Pepper*, 131 S. Ct. at 1229 (recognizing that a court, in a resentencing proceeding, can consider evidence of defendant's post-sentencing rehabilitation or recidivism); *Gall* v. *United States*, 552 U.S. 38, 57 (2007) (recognizing that post-offense behavior was relevant to determining risk of recidivism for purposes of initial sentencing); *United States* v. *Dunnigan*, 507 U.S. 87, 97 (1993) (recognizing that defendant's perjury at trial can inform the sentencing goals of retribution and incapacitation).

A court's ability to consider post-offense information in deciding on an appropriate sentence necessarily includes the ability to consider not only factual developments, but policy developments as well. Like a decision about parole, a decision setting an initial sentence can and should incorporate "[n]ew insights into the accuracy of predictions about the offense and the risk of recidivism consequent upon the offender's release, along with a complex of other factors." *Garner*, 529 U.S. at 253. A sentencing court accordingly does not run afoul of the Ex Post Facto Clause, or any other constitutional provision, when it examines (and,

potentially, adopts) the policy-related reasoning in sentencing opinions issued after the date of the defendant's offense. Cf. *Rogers* v. *Tennessee*, 532 U.S. 451, 464 (2001) (rejecting due process claim based on retroactive change to common-law rule and observing that common-law courts "frequently look to the decisions of other jurisdictions in determining whether to alter or modify a common law rule in light of changed circumstances, increased knowledge, and general logic and experience"). Nor would the Constitution prohibit a sentencing judge from reading or relying on an academic study or policy paper suggesting that longer sentences for certain crimes reduce recidivism rates, even if its publication post-dated the particular crime at issue.

c. Indeed, petitioner himself sees no problem with a district court taking counsel from an updated version of the federal Sentencing Guidelines *themselves*, so long as the court, for official purposes, also calculates and considers the outdated Guidelines range under Section 3553(a)(4). Petitioner acknowledges that the approach described by the First Circuit in *United States* v. *Rodriguez*, 630 F.3d 39 (2010)—under which sentencing judges "can turn to post-offense Guidelines revisions to help select reasonable sentences that (among other things) capture the seriousness of the crimes and impose the right level of deterrence," *id.* at 42—creates no "constitutional question." Pet. Br. 32 n.11; see *United States* v. *Deegan*, 605 F.3d 625, 632 (8th Cir. 2010) (explaining that a district court is "free to consider" the "policy view" expressed by the updated Guidelines), cert. denied, 131 S. Ct. 2094 (2011); see also *United States* v. *Gilmore*, 599 F.3d 160, 165-166 (2d Cir. 2010) (af-

firming a sentence above the advisory Guidelines range at the time of the offense, when the sentencing judge had relied in part on the higher advisory range in a later version of the Guidelines).

It is natural that sentencing courts would, even if not required to do so, seek advice from the Sentencing Guidelines, just as they might seek guidance from a survey of sentences imposed on similar defendants or from a policy paper. The Guidelines are essentially a combination of those two things. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 212, 98 Stat. 1987, instructs the Sentencing Commission to promulgate Sentencing Guidelines that reflect the "same basic § 3553(a) objectives" that a district court's individualized sentencing decision also must promote. *Rita* v. *United States*, 551 U.S. 338, 348 (2007); see *id.* at 348-349; 28 U.S.C. 991(a) (Supp. V 2011) and (b), 994(f) and (m). In crafting the Guidelines, the Commission "took an 'empirical approach,' beginning with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past and then modifying and adjusting past practice in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like." *Rita*, 551 U.S. at 349 (citing Sentencing Guidelines § 1A1.1, comment. (n.3) (2007)); see *ibid.* (noting that the Commission "worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill [its] statutory mandate").

The Commission's mission is an "ongoing" process, in which the Commission continues to "collect and examine" sentencing decisions, and to consult with "prosecutors, defenders, law enforcement groups, civil

liberties associations, experts in penology, and others," in a constant effort to assure that the Guidelines reflect the best sentencing practices possible. *Rita*, 551 U.S. at 350; see *Deegan*, 605 F.3d at 632 ("The 2007 guidelines simply represent another policy view—different from the view embodied in the 1997 guidelines—of the appropriate sentence under § 3553(a)."). Seeking advice from the most up-to-date version of the Guidelines is thus not only a permissible, but also a beneficial, practice, aiding district courts in fulfilling their "obligation" to "change and adapt" the exercise of their sentencing discretion "based on experience." *Garner*, 529 U.S. at 253.

2. Section 3553(a) permissibly lists the most current Guidelines range as one advisory factor that should inform a court's exercise of sentencing discretion

The same reasoning that motivates courts themselves to consult the most up-to-date Guidelines also motivated Congress to instruct, as a categorical matter, that sentencing courts should consult the Guidelines "in effect on the date the defendant is sentenced" in determining the appropriate sentence under Section 3553(a). 18 U.S.C. 3553(a)(4)(A)(ii). The Senate Report accompanying the enactment of that provision observed that "the guidelines are designed to structure the exercise of discretion in making decisions, primarily to accommodate increased knowledge as to how differences among offenses or offenders should affect sentences." *Senate Report* 78. Application of the most current Guidelines, the Report explained, was consistent "with the philosophy embodied in this legislation, that the Sentencing Commission can and should continually revise its guidelines and policies to assure that they are the most sophisticated state-

ments available and will most appropriately carry out the purposes of sentencing." *Id.* at 77.

A district court's consideration of the most current Guidelines range in the manner directed by Section 3553(a)—namely, as an explicit factor that informs the exercise of sentencing discretion, see 18 U.S.C. 3553(a)(4)—does not make a post-offense increase in the Guidelines range into an "ex post facto Law," U.S. Const. Art. I, § 9, Cl. 3. This Court's decisions make clear that even within the framework of Section 3553(a), the Guidelines are "advisory only." *Kimbrough* v. *United States*, 552 U.S. 85, 91 (2007).

a. In its original form, the Sentencing Reform Act "direct[ed] that the court '*shall* impose a sentence of the kind, and within the range' established by the Guidelines, subject to departures in specific, limited cases." *Booker*, 543 U.S. at 234 (quoting 18 U.S.C. 3553(b) (2000 & Supp. IV 2004)). This Court's decision in *Booker* identified a Sixth Amendment problem with such a "mandatory and binding" Guidelines scheme, *id.* at 230-244, because, under it, "the judge, not the jury, * * * determined the upper limits of sentencing," *id.* at 236. If, after trial, the judge were to find additional facts (say, that the defendant had a leadership role in the offense) that increased the Guidelines range (say, from 21 to 27 months to 33 to 41 months), the ultimate sentence could impermissibly exceed the maximum the defendant could have received based solely on the facts found by the jury. *Id.* at 230-235; see *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000).

The Court's remedy for this constitutional infirmity was to "make the Guidelines system advisory," rather than mandatory. *Booker*, 543 U.S. at 246. The Court

emphasized that the constitutional problem had arisen only because the Guidelines had "the force and effect of laws." *Id.* at 234. "If the Guidelines * * * could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts," the Court explained, "their use would not implicate the Sixth Amendment." *Id.* at 233. The Court thus "sever[ed] and excise[d] two specific statutory provisions: the provision that require[d] sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure) * * * and the provision that set[] forth standards of review on appeal," which likewise treated the Guidelines as binding. *Id.* at 259 (citing 18 U.S.C. 3553(b)(1) and 3742(e) (2000 & Supp. IV 2004)).

b. Under "the advisory system the *Booker* Court had in view," sentencing courts are "free to exercise their 'discretion to select a specific sentence'" anywhere in the statutory range. *Cunningham* v. *California*, 549 U.S. 270, 292 (2007) (quoting *Booker*, 543 U.S. at 233). The principal difference between pre-*Booker* sentencing and post-*Booker* sentencing is that the Guidelines, "formerly mandatory," are now "advisory only" and just "one factor among several courts must consider in determining an appropriate sentence." *Kimbrough*, 552 U.S. at 90-91. After *Booker*, "district courts may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in § 3553(a), subject to appellate review for 'reasonableness.'" *Pepper*, 131 S. Ct. at 1241.

This Court's decisions since *Booker* make clear that the Guidelines no longer have constraining legal ef-

fect.[1] First, the Court has emphasized that the Guidelines "are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable." *Nelson* v. *United States*, 555 U.S. 350, 352 (2009) (per curiam). A district court, in considering how the factors in 18 U.S.C. 3553(a) apply to a particular case, "may not presume" that a sentence within the Guidelines range is appropriate, but must instead "make an individualized assessment" of the appropriate sentence "based on the facts presented." *Gall*, 552 U.S. 50; see *Rita*, 551 U.S. at 351 ("In determining the merits of [sentencing-related] arguments, the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."). A sentencing court that considered the Guidelines a legal constraint on its sentencing authority would thus effectively be doing what this Court has forbidden,

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[1] In the immediate wake of *Booker*, the courts of appeals developed rules—including, for example, a proportionality principle that required stronger justifications the more a sentence varied from the Guidelines range, see, *e.g.*, *Gall*, 552 U.S. at 45—that continued to give the Guidelines substantial legal weight in determining a defendant's sentence. As a result, the government initially took the position that the Ex Post Facto Clause continued to apply to the Sentencing Guidelines in the same manner as when they were mandatory. See, *e.g.*, U.S. Br. in Opp. 5, *Demaree* v. *United States* (No. 06-8377). For reasons explained in the text, the Court's post-*Booker* decisions have made clear that the Guidelines have a different role than the government and most courts of appeals initially believed. In light of this Court's clarification in those decisions that the Guidelines are purely advisory, the government has since August 2008 taken the position that the Ex Post Facto Clause does not bar a sentencing court from considering the current version of the advisory Guidelines, even when the version in effect at the time of the offense provided for a lower advisory sentencing range.

namely, applying a presumption that must be rebutted in order to justify imposition of a sentence outside the Guidelines range.

Second, this Court has explained that a sentencing court may impose a sentence different from what the Guidelines advise "not simply based on an individualized determination that [the Guidelines] yield an excessive sentence in a particular case," but also "based on *policy* disagreement" with the Guidelines themselves. *Spears* v. *United States*, 555 U.S. 261, 264 (2009) (per curiam). In other words, a sentencing court has discretion to conclude, as a categorical matter, that the advice provided by the Guidelines would "yield[] a sentence 'greater than necessary' to achieve § 3553(a)'s purpose, *even in a mine-run case.*" *Id.* at 263 (quoting *Kimbrough*, 552 U.S. at 110); see *Pepper*, 131 S. Ct. at 1247 ("[O]ur post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views."). The Guidelines thus impose neither a generalized nor a specific legal constraint on a court's authority to select the sentence that, in its independent judgment, is the most appropriate. Cf. *Miller*, 482 U.S. at 425-426, 432, 435 (selecting sentence outside presumptive range required clear and convincing reasons, not already taken into account in setting the presumptive range itself, based on facts proved beyond a reasonable doubt).

Third, this Court's decision in *Gall* v. *United States*, *supra*, holds that "courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." 552 U.S. at

41. The Court in *Gall* rejected a "rule requiring 'proportional' justifications for departures from the Guidelines range," *id.* at 46; rejected a requirement that sentencing courts identify "'extraordinary' circumstances to justify a sentence outside the Guidelines range," *id.* at 47; and rejected a "mathematical" approach to appellate review that used the percentage by which a sentence varied from the Guidelines range "as the standard for determining the strength of the justifications required" for the sentence, *ibid.* The Court explained that an extraordinary-circumstances or mathematical-proportionality approach would "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." *Ibid.* By requiring the same deferential standard of review no matter what sentence the district court ultimately selects, *Gall* reinforces that the district court's independent judgment, not the Guidelines, is what should determine a defendant's sentence. Cf. *Miller*, 482 U.S. at 426 (no appellate review at all for sentences within the presumptive range).

c. Petitioner's assertion (Pet. Br. 20) that the Guidelines "continue to have the force and effect of law" cannot be squared with this Court's *Booker* jurisprudence. The Court explained in *Booker* that a Guidelines system with "the force and effect of law[]" would, in many applications, infringe a defendant's Sixth Amendment rights by increasing the sentence above the relevant statutory maximum. *Booker*, 543 U.S. at 234; see *id.* at 230-244. In contending that Section 3553(a)(4)'s requirement to *consider* the now-advisory Guidelines is the functional equivalent of a legal directive to *follow* the Guidelines in any signifi-

cant respect, petitioner misunderstands—and would largely undo—the *Booker* remedy. See *Kimbrough*, 552 U.S. at 113-114 (Scalia, J., concurring) ("If there is any thumb on the scales; if the Guidelines *must* be followed even where the district court's application of the § 3553(a) factors is entirely reasonable; then the 'advisory' Guidelines would, over a large expanse of their application * * * violate the Sixth Amendment.").

Petitioner first observes (Pet. Br. 20-21) that district courts are required to correctly calculate the Guidelines range as a prerequisite to determining the appropriate sentence under Section 3553(a). See, *e.g.*, *Gall*, 552 U.S. at 49. But assuring that sentencing courts have the correct advice (*i.e.*, a properly calculated advisory range that accurately reflects the empirical determinations and policy conclusions reflected in the current Guidelines) available to them does not transform that advice into any sort of binding constraint on a district court's sentencing discretion.

Petitioner next highlights (Pet. Br. 22) this Court's instruction that a sentencing court treat the Guidelines range as "the starting point and the initial benchmark" for its consideration of the appropriate sentence. *Gall*, 552 U.S. at 49. That instruction, however, cannot be read to require sentencing courts to give the Guidelines any sort of substantive deference. Any such deference would be at odds with the Court's repeated directive that a sentencing court may not consider the Guidelines range to be presumptively appropriate. See *Nelson*, 555 U.S. at 352; *Gall*, 552 U.S. 50; *Rita*, 551 U.S. at 351. The instruction that the Guidelines be a "starting point" and a "benchmark" instead reflects the nature of the Guidelines as

a distillation of a vast array of information (*e.g.*, the sentences imposed by other courts) that bears directly on the Section 3553(a) factors and that would be infeasible for the district court to gather on its own. Beginning with the Guidelines range ensures that the court has the benefit of that information, see *Rita*, 551 U.S. at 348-350, but it says nothing about what sentence the court should ultimately arrive at. The court remains free to reject the Guidelines' recommendation for either case-specific or policy-related reasons. See, *e.g.*, *Gall*, 552 U.S. at 49-50 (emphasizing that "[t]he Guidelines are not the only consideration" and that a sentencing court should "consider all of the § 3553(a) factors" and "make an individualized assessment based on the facts presented"); see also *Spears*, 555 U.S. at 264 (emphasizing that sentencing courts may disagree with the Commission's policy conclusions); *Pepper*, 131 S. Ct. at 1247 (same).

Petitioner also points (Pet. Br. 22-23) to the Court's statements in *Gall* that a district judge who "decides that an outside-Guidelines sentence is warranted" must "ensure that the justification is sufficiently compelling to support the degree of the variance" and that "a major departure should be supported by a more significant justification than a minor one." 552 U.S. at 50. Contrary to petitioner's suggestion, those statements—which come immediately after the Court's reiteration that a district court "may not presume that the Guidelines range is reasonable," *ibid.*—do not anchor the judge's sentencing discretion to the Guidelines range. As noted above, *Gall* expressly rejected a "rule requiring 'proportional' justifications for departures from the Guidelines range," *id.* at 46, and petitioner errs in reading the quoted statements to rein-

troduce that very rule only a few pages later. Rather, the statements reflect only the "uncontroversial," *id.* at 50, proposition that the district court must have sufficient reasons for whatever it does. If the court agrees that the reasons animating the Guidelines are correct and applicable to the current case, it will, for those reasons, impose a sentence within the Guidelines range. If, however, the court finds the reasons supporting an outside-range sentence more persuasive, it will impose such a sentence, and the extent of the difference between the sentence it imposes and the Guidelines range will reflect the extent to which the reasons adopted by the court differ from those suggested by the Commission. Although the district court may need to give a more thorough explanation of its sentence in cases where its reasoning differs from the already-familiar reasoning underlying the Guidelines, *id.* at 50-51, that explanation requirement places no legal constraint on the reasoning that the sentencing court may adopt. See *ibid.* (noting that explanation of outside-Guidelines sentences "allow[s] for meaningful appellate review and * * * promote[s] the perception of fair sentencing"); *Rita*, 551 U.S. at 357-358 (noting that explanation of outside-Guidelines sentences helps the Commission to adjust the Guidelines); see also 18 U.S.C. 3553(c).

Petitioner likewise misreads *Gall* when he suggests (Pet. Br. 34) that "more searching appellate review" applies to "larger deviations" from the Guidelines range. *Gall* expressly instructs that "courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." 552 U.S. at 41. It further instructs that in re-

viewing an outside-Guidelines sentence, the appellate court must give "due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *Id.* at 51. And it illustrates by example the wide latitude that district courts should receive, upholding a district court's decision to impose only probation notwithstanding that the Guidelines had recommended a sentence of 30 to 37 months. *Id.* at 43, 56-60.[2]

Petitioner additionally focuses (Pet. Br. 25-26) on the Court's holding in *Rita* v. *United States*, *supra*, that an appellate court can choose to—but is not required to—adopt a presumption, solely for purposes of appellate review, that a district court has acted reasonably when its sentence falls within the Guidelines range. 551 U.S. at 347-356. But the Court explained in *Rita* that the presumption it endorsed, "rather than having independent *legal* effect, simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view

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[2] Petitioner notes in passing (Pet. Br. 34) that the Court has left open the question whether "closer review may be in order" when the district court's reasoning is based on broad-based policy disagreement with the Guidelines, rather than the individual circumstances of a particular case. *Kimbrough*, 552 U.S. at 109; see *Pepper*, 131 S. Ct. at 1254 (Breyer, J., concurring in part and concurring in the judgment) (noting that *Kimbrough* raised, but did not answer, that question). Even if "closer review" were warranted in such circumstances, however, that would not be because the Guidelines themselves have any legal force. It would instead reflect that a district court's institutional advantages extend only to individualized factors, *Kimbrough*, 552 U.S. at 109, and appellate courts thus have more reason to defer to decisions based on those factors than decisions based on more generalized considerations.

of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable." *Id.* at 350-351 (emphasis added). Even if petitioner were correct in speculating (*e.g.*, Pet. Br. 25, 30) that the presumption causes sentencing courts to disregard their best sentencing judgment in favor of imposing sentences less likely to get reversed, that would not demonstrate that the presumption has any legally binding effect for ex post facto purposes.

d. Nor can petitioner show such a legally binding effect by presenting (*e.g.*, Pet. Br. 27-30) data about the correlation between the sentences judges impose and the ranges that the Guidelines recommend. See also Illinois Ass'n of Criminal Defense Lawyers (IACDL) Amicus Br. 8-12. Even assuming an examination of such data were an appropriate mode of analysis under the Ex Post Facto Clause, see Part C, *infra*, petitioner "mistakes correlation for causation." *Woodford* v. *Ngo*, 548 U.S. 81, 94 n.4 (2006). A judge's decision to impose a sentence within or close to the Guidelines range most plausibly suggests that the Guidelines are persuasive, not that district courts are disregarding this Court's instruction to treat them as purely advisory. See *Rita*, 551 U.S. at 351 (allowing appellate courts to presume that a within-Guidelines sentence reflects a "discretionary decision" that "accords with the Commission's view"); cf. *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 386 (2008) (appellate court should not presume that district court's discretionary decision rested on an incorrect legal premise).

As discussed above, see pp. 28-29, *supra*, courts have good reason to find the Guidelines helpful, irrespective of Section 3553(a)'s requirement to consider

them. The "sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other, at wholesale." *Rita*, 551 U.S. at 348. The Guidelines are designed to provide good, expert advice, and the Commission is constantly adjusting them in an effort to improve that advice. See *id.* at 348-350. *Booker* expressly anticipated that Commission would "continue to collect and study" judicial decisions and "to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices." 543 U.S. at 263. If courts begin regularly disregarding the Commission's advice, even in mine-run cases, the Commission may well "revise the Guidelines" to reflect those courts' reasoning. *Rita*, 551 U.S. at 350.

The Commission's work thus "promote[s] uniformity in the sentencing process" not by placing constraints on district courts, but by offering them recommendations and engaging in an ongoing dialogue about best sentencing practices. *Booker*, 543 U.S. at 263. Updates to the Guidelines, which can reflect that ongoing dialogue, neither bind sentencing courts nor "increase[] the penalty by which a crime is punishable," *Morales*, 514 U.S. at 506 n.3, and thus do not meet the constitutional definition of an ex post facto law.

3. The purposes of the Ex Post Facto Clause do not apply to an amendment that increases an advisory Guidelines range

The purposes of the Ex Post Facto Clause reinforce the conclusion that an amendment to the Guidelines is not an ex post facto law. This Court has explained that the "central concerns" of the Ex Post

Facto Clause are "'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'" *Lynce*, 519 U.S. at 441 (quoting *Weaver*, 450 U.S. at 30). A change to an advisory Guidelines range does not raise either concern.

a. This Court has held that, after *Booker*, a defendant no longer has "[a]ny expectation subject to due process protection" that he will receive a sentence within the Guidelines range and thus has no entitlement to notice of a court's intent to impose a sentence outside that range. *Irizarry* v. *United States*, 553 U.S. 708, 713 (2008). It necessarily follows that he has no due process entitlement to notice when the advisory range itself changes, and the same would also be true under the Ex Post Facto Clause. Although the protections of the Due Process Clause and the Ex Post Facto Clause are not congruent in all respects, see *Rogers*, 532 U.S. at 456-462, the Ex Post Facto Clause creates no greater entitlement to notice than the Due Process Clause does. Compare *id.* at 459 (describing the "core due process concepts of notice, foreseeability, and * * * fair warning"), with *Weaver*, 450 U.S. at 28 (describing ex post facto "fair warning" interest).

Petitioner has effectively acknowledged that the notice-related purpose of the Ex Post Facto Clause does not support his argument.[3] His response to the

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[3] In particular, petitioner has never raised, and has therefore forfeited, any individualized notice-related argument based on the happenstance that his particular crimes were committed before *Booker*, while the Guidelines were still mandatory. See, *e.g.*, Pet. 21 (representing that this case would be a "perfect vehicle" for resolving the general question whether amendments increasing

government's citation of *Irizarry* in its brief in opposition to certiorari was simply to assert that "the Ex Post Facto Clause requires more than just notice" and to note the Clause's other central concern, "'vindictive legislation.'" Cert. Reply Br. 5 (quoting *Weaver*, 450 U.S. at 29).

b. But that concern likewise provides no meaningful support for petitioner's view that Guidelines amendments can be ex post facto laws. This Court has recognized that the Commission "is an independent agency in every relevant sense," *Mistretta* v. *United States*, 488 U.S. 361, 393 (1989); that it is located in a "nonpolitical Branch," rather than within Congress or the Executive Branch, *id.* at 396; and that its "independence" is "safeguard[ed] * * * from executive control" by the requirement that Commission members be removed only for good cause, *id.* at 410. The Commission's "empirical approach" to crafting the Guidelines is informed to a considerable degree by actual judicial sentencing decisions that are themselves entirely insulated from political concerns. *Rita*, 551 U.S. at 349; see *id.* at 349-350; see also *Butz* v. *Economou*, 438 U.S. 478, 512 (1978) (recognizing the "insulation of the judge from political influence").

Congress does exert some direct control over the Guidelines. Amendments by the Commission do not become effective for at least 180 days, so that Congress can have the opportunity to modify or disapprove them. 28 U.S.C. 994(p). Congress sometimes

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the advisory Guidelines range are ex post facto laws). In any event, courts of appeals have uniformly rejected the argument that retroactive application of the *Booker* remedy itself is generally unconstitutional. See *United States* v. *Waseta*, 647 F.3d 980, 985 & n.5 (10th Cir. 2011).

amends the Guidelines directly. See, *e.g.*, Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, Tit. IV, § 401(b), (g) and (i), 117 Stat. 668, 671, 672. And Congress sometimes provides direction to the Commission about factors to be considered in potentially adjusting the Guidelines. See, *e.g.*, Identity Theft Enforcement and Restitution Act of 2008, Pub. L. No. 110-326, Tit. II, § 209, 122 Stat. 3564-3565.

But Congress "placed the Commission in the Judicial Branch precisely because of the Judiciary's special knowledge and expertise," *Mistretta*, 488 U.S. at 396, and it generally defers to that expertise. In the main, Congress leaves the details of the Guidelines to the Commission—as it did with the amendments to the particular Guidelines under which petitioner himself was sentenced. See Sentencing Guidelines App. C, amend. 617 (effective Nov. 1, 2001) (explaining that amendment was "the result of Commission study of economic crime issues over a number of years"); Sentencing Guidelines App. C, amend. 653 (effective Nov. 1, 2003) (explaining that amendment responded to general congressional directive "to consider" whether fraud guidelines "'were sufficient to deter and punish'" particular offenses, in light of increases to statutory maximum penalties for certain fraud crimes other than bank fraud) (quoting White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. 107-204, Tit. IX, § 905(b)(2), 116 Stat. 805).

Even when Congress does legislate Guidelines changes itself, such legislation does not have a direct effect on criminal sentences. Instead, it becomes incorporated into a framework that is itself only advisory. The independent judgment of the sentencing

judge thus provides a buffer against the "danger that legislatures might disfavor certain persons after the fact." *Garner*, 529 U.S. at 253; cf. *Mistretta*, 488 U.S. at 365 ("If a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.") (quoting *United States* v. *Brown*, 381 U.S. 437, 443 (1965)) (brackets omitted).

c. In describing the purposes of the Ex Post Facto Clause, petitioner observes (Pet. Br. 18) that *Carmell* v. *Texas*, *supra*, noted the existence of "a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." 529 U.S. 533. *Carmell* additionally explains, however, that this "principle of unfairness * * * is not a doctrine unto itself, invalidating laws under the *Ex Post Facto* Clause by its own force." *Id.* at 533 n.23. In any event, the principle by its own terms is not at issue when the "rules of law" themselves remain unchanged, *id.* at 533, as is the case with a modification to the advisory Sentencing Guidelines.

C. Petitioner's Approach To Ex Post Facto Analysis Is Flawed

Petitioner appears to contend that, even if the Guidelines impose no binding constraint on a sentencing judge's discretion, an amendment that increases a Guidelines range is nevertheless an ex post facto law, because it will "influence" the mind of the sentencing judge and thereby create a "'significant risk'" that the judge will decide to impose a higher sentence. Pet.

Br. 20 (quoting *Garner*, 529 U.S. at 255); see *e.g.*, *id.* at 23-24 (arguing that judges will be drawn to the Guidelines); see also IACDL Amicus Br. 6-12 (making similar argument). That subjective approach to ex post facto analysis finds no support in this Court's decisions and makes little sense as an original matter.

1. Petitioner errs in relying on *Garner* for the proposition that ex post facto analysis turns on "whether the 'practical implementation' of [a] rule may influence a decisionmaker's 'exercise of discretion' so as to lengthen incarceration." Pet. Br. 20 (quoting *Garner*, 529 U.S. at 255) (brackets omitted). The word "influence" appears nowhere in *Garner*, and neither *Garner* nor any other ex post facto decision of this Court cited by petitioner endorses an amorphous judicial inquiry into how a particular provision might "influence" discretionary sentencing decisions.

As previously discussed (see pp. 19-20, *supra*), *Garner* presented an ex post facto challenge to a parole-board rule, imbued with binding legal force by the state legislature, that gave the board new authority to increase the waiting period between parole hearings. 529 U.S. at 246-247. Citing *Morales*, the Court explained that the critical question was "whether the amended Georgia Rule creates a significant risk of prolonging respondent's incarceration." *Id.* at 251 (citing *Morales*, 514 U.S. at 509). The Court ultimately concluded that the rule "d[id] not by its own terms show a significant risk," but it remanded for further proceedings in which the inmate might "demonstrate" the existence of such risk as applied to his particular case, through evidence of "the rule's practical implementation by the agency charged with exercising discretion." *Id.* at 255; see *id.* at 254-257.

The "significant risk" to which the Court referred was not, as petitioner suggests, a risk that the new rule would "influence" the parole board's discretionary decisionmaking. The Court declined to treat the ex post facto claim in *Garner* as a claim "that discretion has been *changed* in its exercise." 529 U.S. at 254 (emphasis added). Such a change, the Court suggested, would not present significant ex post facto concerns. *Id.* at 253 ("The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience."). Rather, the Court construed the ex post facto claim in *Garner* as a claim "that, in the period between parole reviews, [discretion] will not be exercised *at all*." *Id.* at 254 (emphasis added). The "significant risk" that the inmate had to demonstrate in order to prevail was thus a risk that the board would *fail* to exercise discretion, not a risk that the board would exercise its discretion in a particular *manner*. *Garner* accordingly does not support petitioner's contention that updated advice can violate the Ex Post Facto Clause by influencing the thinking of judges when they make discretionary sentencing decisions.[4]

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[4] Petitioner's suggestion (Pet. Br. 16) that the Court should look to generalized "empirical data" to determine whether the Guidelines categorically exert a "gravitational pull" on sentencing decisions resembles the approach of the dissent in *Garner*, which the Court did not adopt. The *Garner* dissent pointed out that, under statistics presented by the State itself, 70% of prisoners in the previous year had been required to wait the full, newly expanded period for reconsideration of parole. 529 U.S. at 264 n.4 (Souter, J., dissenting). The dissent also pointed to the parole board's official statement that offense severity was the "'overriding factor'" in parole determinations as evidence that individualized consideration of "changed circumstances or new information would

2. The identification of ex post facto laws is, of course, a "matter of degree," *Morales*, 514 U.S. at 509 (internal quotation marks and citation omitted), and *Garner*'s "significant risk" test could thus appropriately encompass a binding legal provision that effectively divests a sentencing court of a significant portion of its sentencing discretion. See, *e.g.*, *Miller*, 482 U.S. at 435. But even assuming the test could be applied to non-binding advice like the federal Sentencing Guidelines, petitioner's claim here would still fail the test. As in *Garner*, the "requisite risk is not *inherent* in the framework" being challenged, 529 U.S. at 251 (emphasis added), because district courts retain independent sentencing discretion under the law and should be presumed to "exercise[] [that] discretion in accordance with" the circumstances of individual cases, *id.* at 256.

Nor can petitioner (or any other defendant) show "that as applied to his own sentence," a Guidelines amendment "create[s] a significant risk of increasing his punishment." *Garner*, 529 U.S. at 255. Petitioner contends (Pet. Br. 38-41) that the district court here gave undue deference to the Guidelines. But even assuming that contention were correct, all it would mean is that the district court committed *statutory* error in his sentencing. As previously discussed, this

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rarely make a difference" to the length of a prisoner's sentence. *Id.* at 264 n.5 (Souter, J., dissenting) (citation omitted). Petitioner's arguments here are similar in kind but weaker in substance to the ones the majority apparently found unpersuasive in *Garner*. See, *e.g.*, Pet. Br. 27 (noting that 54.5% of defendants were sentenced within the Guidelines range); *id.* at 24 (noting that 75% of surveyed district court judges think an advisory Guidelines system "best achieves the purposes of sentencing"). They do not warrant a different result.

Court's post-*Booker* decisions interpreting Section 3553(a) prohibit a district court from treating the Guidelines as a constraint on its sentencing discretion. See, *e.g.*, *Gall*, 552 U.S. at 46, 50 (courts cannot either "presume that the Guidelines range is reasonable" or "requir[e] 'proportional' justifications for departures" from that range). A violation of that prohibition would provide the basis for a claim that the district court has *misapplied* the framework that governs federal sentencing. See *Nelson*, 555 U.S. at 350-352. It would not, however, provide the basis for a claim that the framework *itself* violates the Ex Post Facto Clause.

Petitioner here has not challenged his sentence on statutory grounds. The Court should accordingly review this case on the premise that the sentencing was consistent with this Court's instructions in *Booker* and subsequent cases. See *Irizarry*, 553 U.S. at 717 (Thomas, J., concurring) (concluding, in case where "the issue" of the *Booker* remedy's correctness was "not currently before" the Court, that Fed. R. Crim. P. 32(h) did not require notice of a non-Guidelines sentence imposed pursuant to the *Booker* remedy). And a sentence imposed in accordance with those instructions, in which the Guidelines have a purely advisory role, does not violate the Ex Post Facto Clause.

3. Petitioner's proposed "influence"-based inquiry into sentencing judges' psychology is also methodologically unsound. Statistics about the frequency with which judges impose within-Guidelines sentences say nothing about whether judges who do so are independently agreeing with the Guidelines or impermissibly adhering to them. And any attempt to set a statistical threshold at which advisory Guidelines

transform into ex post facto laws would be inherently arbitrary and create the possibility that the Guidelines' ex post facto status would fluctuate with each new set of data from the Sentencing Commission.

More fundamentally, petitioner's reliance on broad-brush sentencing statistics cannot be reconciled with the inherently individualized nature of sentencing. For one thing, the Guidelines are composed of many different provisions. Viewing the data only in aggregate fails to capture that judges apparently find certain Guidelines to be particularly unpersuasive. For example, for child-pornography sentencings in the last reported fiscal year, judges imposed within-Guidelines sentences only 34.9% of the time and imposed non-government-sponsored below-Guidelines sentences 44.9% of the time. See U.S. Sentencing Comm'n, *2011 Sourcebook of Federal Sentencing Statistics* Tbl. 27a, http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table27a.pdf (*2011 Sentencing Statistics*). Similarly, for tax-crime sentencings in the last reported fiscal year, judges imposed within-Guidelines sentences only 37.4% of the time and imposed non-government-sponsored below-Guidelines sentences 42.3% of the time. *Ibid.* And for sentencings under a particular drug Guideline (§2D1.11, which applies to offenses involving chemicals used to make drugs) in the last reported fiscal year, judges imposed within-Guidelines sentences only 19.9% of the time and imposed non-government-sponsored below-Guidelines sentences 39.1% of the time. *2011 Sentencing Statistics* Tbl. 28, http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table28.pdf.

The frequency of within-Guidelines sentences can also vary over time. If judges ten years from now were to find the Guidelines system as a whole to be much less helpful than judges today do, it would be anomalous to conclude that such a change in judicial mindset would affect the analysis of whether a Guidelines amendment can be an ex post facto law. Cf. *Rogers*, 532 U.S. at 456 (observing that the Ex Post Facto Clause "does not of its own force apply to the Judicial Branch of government"). Moreover, judges need not engage in groupthink, and agreement with the Guidelines can vary by judicial district or by individual judge. For example, while the District Court for the Southern District of Ohio and the District Court for the Southern District of Georgia each sentenced about 750 defendants in the last reported fiscal year, judges in the former imposed within-Guidelines sentences 34.4% of the time, while judges in the latter imposed within-Guidelines sentences 80.2% of the time. U.S. Sentencing Comm'n, *Statistical Information Packet, Fiscal Year 2011, Sixth Circuit* Tbl. 9 at 14, 16, http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/2011/6c11.pdf. Although some of that gap is the result of differences the number of government-sponsored departures (which say little one way or the other about what the judge would otherwise have done), the difference also reflects that non-government-sponsored below-range sentences were over four times as common in the Southern District of Ohio. *Id.* Tbl. 9 at 15, 17.

These distinctions not only reinforce the inference that judges are, in fact, applying their own independent judgment at sentencing, but they also demon-

strate the flaws in petitioner's statistical approach to the Ex Post Facto Clause. It makes little sense to treat various different Guidelines, along with the past, present, and future judges who consider them, as a single undifferentiated mass. Nor does it make sense for the ex post facto analysis to vary by offense, time, location, and/or other factors. Such circumstance-specific variance would create a patchwork quilt of ex post facto law; would burden courts with collecting appropriately localized data as a prerequisite to determining which version of the Guidelines to consult; and would be impossible in cases where statistically significant data about a new Guidelines amendment do not yet exist. Nothing warrants adoption of such an unwieldy constitutional analysis for the advisory Sentencing Guidelines, which function solely as advice to an Article III court independently charged with imposing an appropriate sentence.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, provides:

No Bill of Attainder or ex post facto Law shall be passed.

2. Section 3553(a) of the United States Code provides:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of

whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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[1] So in original. The period probably should be a semicolon.

REPLY BRIEF

RECORD
AND
BRIEFS

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IN THE
Supreme Court of the United States

MARVIN PEUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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REPLY BRIEF

In *Garner v. Jones*, this Court defined the test for a violation of the Ex Post Facto Clause as whether an amended law, "in its operation, created *a significant risk* of increased punishment for [the defendant]." 529 U.S. 244, 257 (2000) (emphasis added). This Court had applied the same test as the "controlling inquiry" in *California Department of Corrections v. Morales*, 514 U.S. 499, 509 (1995). *Garner*, 529 U.S. at 250. But even though "significant risk" is the controlling standard under this Court's precedents, that term does not even appear in the argument section of the Government's brief until page 44 – and then only as Petitioner's creation. *See* U.S. Br. 44 ("Petitioner appears to contend that" it violates the Ex Post Facto Clause if the amended Guidelines "create a 'significant risk' that the judge will decide to impose a higher sentence"); *see also* U.S. Br. 12 (summarizing this argument).

The Government effectively asks this Court to eviscerate (if not abandon) the *Garner/Morales* significant-risk standard. The Government would recast the significant-risk test as applying only to "a binding legal provision that effectively divests a sentencing court of a significant portion of its sentencing discretion." U.S. Br. 47. But neither *Garner* nor *Morales* dealt with a law curtailing discretion; to the contrary, the claim in each case was that the *exercise* of discretion under the new law significantly increased the risk of lengthening the defendant's incarceration. The Government attempts to rewrite the significant-risk standard because it cannot meet it. As every court to employ this standard has ruled, retroactive application of harsher

Sentencing Guidelines produces a significant risk of increased punishment, and therefore violates the Ex Post Facto Clause. Pet'r. Br. 32-33 & n.11.

Not only does the Government disregard the controlling standard, but it improperly discounts the Guidelines as mere "advice," U.S. Br. 9, 11, 12, 24, 28, 29, 33, 35, 40, 46, 47, 51, or no different in legal effect from "an academic study or policy paper," or inapplicable versions of the Guidelines from other years, that a sentencing court may consult of its own volition. *Id.* at 27. To the contrary, after *United States v. Booker*, 543 U.S. 220 (2005), the Sentencing Reform Act continues to "constrain sentencing courts' discretion" by making the Guidelines sentencing range a mandatory consideration in sentencing, *see Pepper v. United States*, 131 S. Ct. 1229, 1241 (2011), even if that range is no longer binding in the imposition of a sentence. Federal district courts must apply the Guidelines methodologies, calculate the Guidelines range, evaluate that range as the initial benchmark, and consider it throughout the sentencing process. *Gall v. United States*, 552 U.S. 38, 49-50 & n.6 (2007). For any variance from the Guidelines range, a district court must also supply a justification that is sufficiently compelling to support its degree. *Id.* at 50. Appellate courts in turn review the sentence for substantive reasonableness and may presume that within-Guidelines sentences are reasonable. *Id.* at 51. "This sentencing framework," *Pepper*, 131 S. Ct. at 1241, is designed to achieve the Act's purpose of promoting sentencing uniformity within the strictures of the Sixth Amendment. *Booker*, 543 U.S. at 264-65 (Breyer, J., remedial majority opinion); *Rita v. United States*, 551 U.S. 338, 354 (2007) (acknowledging prediction that the

appellate presumption of reasonableness "will encourage sentencing judges to impose Guidelines sentences" but finding that outcome consistent with the Act's goals of reducing sentencing disparities).

As five Justices of this Court have recognized, under this framework, "the Guidelines are in a real sense a basis for the sentence" regardless of whether the sentence is imposed within the Guidelines range, or whether "the judge uses the sentencing range as the beginning point to explain the decision to deviate from it." *Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) (plurality); *accord id.* at 2695 (Sotomayor, J., concurring in the judgment) (agreeing except for plea agreements under Federal Rule of Criminal Procedure 11(c)(1)(C)). In practical operation, when the Commission increases the applicable Guidelines range that is the very basis for a sentence, it creates a significant risk that the defendant will receive increased punishment in violation of the Ex Post Facto Clause.

The assessment of significant risk is not a "subjective inquiry" into the minds of sentencing judges, as the Government contends (U.S. Br. 12), any more than this Court conducted a subjective inquiry into the minds of parole officials in *Garner* and *Morales*. Rather, the Ex Post Facto Clause calls for an objective risk assessment based upon the amendment's practical operation. *Garner*, 529 U.S. at 255; *Lynce v. Mathis*, 519 U.S. 433, 442-43 (1997). The Sentencing Commission has recently confirmed that when amendments increase the Guidelines minimum, average sentences increase. UNITED STATES SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON

FEDERAL SENTENCING 60 (2012) (the "USSC *Booker* Report"). Here, Peugh has shown not merely a significant objective risk of increased punishment from the retroactive application of harsher Guidelines generally, but a virtual certainty in his own case. In sentencing Peugh, the district court expressly deferred to the 2009 Guidelines, imposing a 70-month sentence that was at the bottom of the 2009 Guidelines range but 24 months higher than the *maximum* under the 1998 Guidelines in effect at the time of his offense. J.A. 96. The retroactive application of the harsher 2009 Guidelines to Peugh violated the Ex Post Facto Clause.

I. RETROACTIVE APPLICATION OF A LAW CREATING A SIGNIFICANT RISK OF INCREASED PUNISHMENT VIOLATES THE EX POST FACTO CLAUSE.

1. Unhappy with the *Garner/Morales* significant-risk standard, the Government scrambles to propose different formulations. First, the Government claims that the Ex Post Facto Clause only applies to "a binding change in the governing legal framework," such as a law that (1) "expressly authorized something that had not been authorized before," or (2) "eliminated or limited something that had previously been available," or (3) "did a combination of the two." U.S. Br. 17-18. At another point, the Government alternatively suggests that "a punishment-related provision violates the Ex Post Facto Clause only if it makes a binding legal change that alters the conditions under which a more lenient punishment is available." U.S. Br. 20. It is unclear what this latter phrase means, except that the Government believes that only presumptive

guidelines of the kind invalidated in *Miller v. Florida*, 482 U.S. 423 (1987), can give rise to a violation. U.S. Br. 20. Regardless, the Government's proposed tests are irreconcilable with this Court's precedents.

2. This Court rejected the Government's narrow construction of the Ex Post Facto Clause in *Morales*. *Morales* concerned a 1981 amendment to a state parole law. The amendment afforded the parole board discretion to hold parole hearings every three years rather than annually if the prisoner had been convicted of multiple homicides and there was no reasonable expectation that parole would be granted. The Court found that the amendment did not authorize a different maximum term of punishment as in *Lindsey v. Washington*, 301 U.S. 397 (1937), or change the punishment formula as in *Miller v. Florida*, 482 U.S. 423 (1987), or *Weaver v. Graham*, 450 U.S. 24 (1981). *See Morales*, 514 U.S. at 505-08.

If the Government's proposed test were the law, that determination should have ended the inquiry. But the question under the Ex Post Facto Clause is always whether "objectively" the change in law "had the *effect* of lengthening petitioner's period of incarceration." *Lynce*, 519 U.S. at 442-43 (emphasis added). Even though the 1981 amendment changed neither the term nor formula of punishment, the *Morales* Court declared that "what legislative adjustments 'will be held to be of sufficient moment to transgress the constitutional prohibition' *must* be a matter of 'degree.'" *Morales*, 514 U.S. at 509 (quoting *Beazell v. Ohio*, 269 U.S. 167, 171 (1925)). Accordingly, "[i]n evaluating the constitutionality of the 1981 amendment, *we must determine* whether it produces *a sufficient risk* of increasing the measure of

punishment attached to the covered crimes." *Id.* (emphases added).[1]

The *Morales* Court elaborated that "[t]he *ex post facto* standard we apply today ... looks to whether a given legislative change has the prohibited effect of ... increasing punishments," and "considers a number of factors." *Id.* at 509 n.7. In analyzing the risk that the Board would exercise its discretion under the new law to increase the sentence served, the Court found that (1) "the amendment applie[d] only to a class of prisoners for whom the likelihood of release on parole is quite remote"; (2) the amendment did not affect initial hearings but only subsequent hearings for prisoners unlikely to receive parole; and (3) "the Board retain[ed] the authority to tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner." *Id.* at 510-12. Even on the off chance that changed circumstances would alter parole prospects for persons convicted of multiple homicides, the Board would have the discretion to expedite both the hearing and release date, and so "a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings." *Id.* at 512-13. Thus, *Morales* turned not on whether the retroactive law prescribed binding limits on punishment discretion. Rather, the Court found no *ex post facto* violation because the law in practical operation yielded "only the most speculative and

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[1] The Government cites the *Morales* formulation that the new law must "'increase[] the penalty by which a crime is punishable,'" U.S. Br. 19 (quoting *Morales*, 514 U.S. at 506 n.3), but this Court has stated that this is the same test as the sufficient-risk standard. *Lynce*, 519 U.S. at 443 n.14.

attenuated risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 514.

3. Recognizing the significant-risk test as the "controlling inquiry" in *Morales*, this Court in *Garner* applied the same test to a broader regulation of the Georgia Board of Parole that changed the maximum interval between parole reconsideration hearings for all inmates serving life sentences from three to eight years. 529 U.S. at 247-48, 250. *Garner* likewise rejected the idea that the amendment must prescribe a change in punishment or remove discretion; the Court declared that "[t]he presence of discretion does not displace the protections of the *Ex Post Facto* Clause." *Id.* at 253. The key inquiry is the effect of the amended law on the *exercise* of discretion: "When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with *exercising discretion*, that its retroactive application will result in a longer period of incarceration than under the earlier rule." *Id.* at 255 (emphasis added).

In *Garner*, the respondent claimed that the retroactively applied regulation caused the Board not to exercise its discretion to set parole hearings as frequently, and thereby created a significant risk of prolonging his incarceration. *Id.* at 254. Examining "the operation of the amendment to Rule 475-3-.05(2) within the whole context of Georgia's parole system," the Court declared that "[o]n the record in this case, we cannot conclude the change in Georgia law lengthened respondent's time of actual imprisonment." *Id.* at 252, 256. The Court reasoned

that even under the new regulation the Board retained "discretion as to how often to set an inmate's date for reconsideration," and its written policy was to expedite hearings based on changed circumstances and new information. *Id.* at 254. Deferring to the Board's policy statement, the Court presumed that "the Board *exercises its discretion* in accordance with its assessment of each inmate's likelihood of release between reconsideration dates." *Id.* at 256 (emphasis added). Accordingly, "the Board's Rule changes are designed for the better exercise of the discretion it had from the outset," and there was no evidence of a significant risk that the respondent would have been released earlier but for the new hearing-interval regulation. *Id.* at 255, 256-57. Nonetheless, the Court left open the possibility that the respondent could prove significant risk if granted discovery. *Id.*

4. The Government attempts to recast the significant-risk test as merely a rule that the *elimination* of significant discretion may violate the Ex Post Facto Clause. U.S. Br. 47. The contention is unfounded; neither *Morales* nor *Garner* involved the elimination or curtailment of discretion.[2] Rather, the

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[2] The Government relies on a passage in *Garner* in which the Court says a defendant has no entitlement under the Ex Post Facto Clause to notice of how his penalty will be affected by discretionary decisions to grant or deny parole, because discretion adapts to new data on offense predictions and recidivism. *Garner*, 529 U.S. at 253 (*quoted in* U.S. Br. 46). The *Garner* Court quickly noted, however, the discretion *to grant or deny parole* was not the gravamen of respondent's claim: "The essence of respondent's case, as we see it, is not that discretion has been changed in its exercise but that, in the period between parole reviews, it will not be exercised at all." *Id.*

parole board in each case had been granted *additional* discretion to hold parole hearings less frequently, and the question was whether the *exercise* of such discretion under the new law had created a significant risk of prolonging respondent's incarceration. This Court deemed that an empirical question dependent upon the practical implementation of the rule by the agency with discretion. *Garner*, 529 U.S. at 255.

That is exactly the test that this Court must apply here in dealing with a law that affects the district court's exercise of sentencing discretion. The question is whether promulgation of harsher Guidelines after the offense creates a significant risk that a district court exercising sentencing discretion will impose a more severe sentence. The answer is yes. Pet'r Br. 20-41.

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at 254. The Government misreads that passage to mean that the exercise of discretion never violates the Ex Post Facto Clause. U.S. Br. 46. To the contrary, that passage means only that respondent had complained that the exercise of discretion under the new regulation to deny him a hearing would deprive him of the exercise of substantive discretion to grant parole and release him early. *See Garner*, 529 U.S. at 259 (Scalia, J., concurring in the judgment) ("In essence, respondent complains that by *exercising* its discretion (as to the frequency of review), the Board has *deprived* him of the exercise of its discretion (as to the question of his release).")

II. Sentencing Guidelines Have The Force And Effect Of Law Even If They Do Not Establish Binding Sentencing Ranges.

1. Throughout its brief, the Government conflates two separate issues: whether the Sentencing Guidelines have the force and effect of law (and thus are subject to the Ex Post Facto Clause) and whether they establish binding sentencing ranges to which a district court must adhere. *See* U.S. Br. 23-24. *Booker* removed the latter trait of the Guidelines when it excised the statutory provisions making the Guidelines sentencing range mandatory. 543 U.S. at 245 (Breyer, J., remedial majority opinion) (severing 18 U.S.C. §§ 3553(b)(1), 3742(e)). But nothing in *Booker* deprives the Guidelines of all prescriptive force. To the contrary, the Guidelines continue to prescribe the "framework" for the exercise of discretion by sentencing courts, *Freeman*, 131 S. Ct. at 2692 (plurality), and are laws within the meaning of the Ex Post Facto Clause.

In arguing that the Guidelines lack the force and effect of law, the Government steadfastly denies that the Guidelines are "constraints on a sentencing court's discretion." U.S. Br. 12. This Court has recognized the contrary. In *Pepper*, the Court identified two "important respects" in which the Sentencing Reform Act "did constrain sentencing courts' discretion": (1) by making the Guidelines range mandatory under § 3553(b)(1), and (2) "by specifying various factors that courts must consider in exercising their discretion, see § 3553(a)." *Pepper*, 131 S. Ct. at 1241. Among the latter constraints is the requirement that "[t]he court, in determining the particular sentence to be imposed, *shall consider* ...

the kinds of sentence and the sentencing range established for ... the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines ... issued by the Sentencing Commission." 18 U.S.C. § 3553(a)(4)(A)(i) (2012) (emphasis added). Even in removing the first constraint, *Booker* specifically left the second constraint intact: "The district courts, while not bound to apply the Guidelines, *must consult* those Guidelines and take them into account when sentencing." *Booker*, 543 U.S. at 264 (Breyer, J., remedial majority opinion) (emphasis added).

The post-*Booker* Guidelines thus prescribe the Guidelines range that serves as the mandatory benchmark and initial starting point for sentencing, even though the district court is not bound to sentence within that range. The Guidelines prescribe the methodology that judges must follow to calculate the substantive Guidelines range accurately. Pet'r. Br. 20-22; *Gall*, 552 U.S. at 49-50. District courts are subject to reversal for failure to apply the Guidelines or calculate the Guidelines ranges correctly. Pet'r Br. 20-21 & n.7. Because the Sentencing Guidelines prescribe with the force and effect of law a substantive standard that the district court must consider as an initial benchmark, and from which any variance must be justified, they are subject to the prohibitions of the Ex Post Facto Clause.[3]

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[3] *See Stinson v. United States*, 508 U.S. 36, 45 (1993) (noting that Guidelines "are the equivalent of legislative rules adopted by federal agencies"); *Garner*, 529 U.S. at 247 (analyzing a regulation). The Government concedes that the parole regulation in *Garner* had the force and effect of law because the Georgia legislature had delegated

The Government thus errs when it repeatedly characterizes the Guidelines as nothing more than a source of information from which sentencing courts may "seek advice." U.S. Br. 28; *accord id.* at 9 (Guidelines are "the Sentencing Commission's most up-to-date, non-binding advice about best practices in federal sentencing"), 11, 12, 24, 29, 33, 35, 40, 46, 47, 51. According to the Government, the Guidelines have no legal effect different from "an academic study or policy paper," *id.* at 27, "the policy-related reasoning in sentencing opinions," *id.*, versions of Guidelines from different years, *id.*, or any "survey of sentences imposed on similar defendants," *id.* at 28. The Government belittles the benchmark requirement as simply "reflect[ing] the nature of the Guidelines as a distillation of a vast array of information (*e.g.*, the sentences imposed by other courts) that bears directly on the Section 3553(a) factors and that would be infeasible for the district court to gather on its own." U.S. Br. 35-36.

The Government misconceives the function of the Guidelines in the post-*Booker* scheme. As five Justices agreed in *Freeman* (and none disagreed), the Guidelines provide the framework for any exercise of discretion by sentencing judges:

> The Guidelines *provide a framework or starting point—a basis, in the commonsense meaning of the term—for the judge's exercise of discretion.* *E.g.*, 1 Oxford English Dictionary 977 (2d ed.

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statutory authority to the Board, U.S. Br. 18, but Congress has likewise delegated statutory authority to the Commission. Pet'r Br. 4-5.

> 1989). .... In the usual sentencing, whether following trial or plea, the judge's reliance on the Guidelines will be apparent, for the judge will use the Guidelines range as the starting point in the analysis and impose a sentence within the range. Even where the judge varies from the recommended range, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence.

131 S. Ct. at 2692 (emphasis added; citations omitted); *id.* at 2695 (Sotomayor, J., concurring in the judgment) ("As the plurality explains, in the normal course the district judge's calculation of the Guidelines range applicable to the charged offenses will serve as the basis for the term of imprisonment imposed.").[4] The Government cannot reasonably contend that advisory Guidelines that define the framework and substantive basis for the district court's exercise of sentencing discretion lack the force and effect of law.

Because the Government confuses the distinct questions of whether the advisory Guidelines are laws, and whether they bind the district court to sentence within a precise range, it caricatures Peugh's arguments. In asserting that the advisory Guidelines have the force and effect of law, Peugh does not contend that "the requirement to *consider*

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[4] The dissenting justices did not address this point in *Freeman*.

the now-advisory Guidelines is the functional equivalent of a legal directive to *follow* the Guidelines in any significant respect," U.S. Br. 34-35, that the post-*Booker* framework "require[s] sentencing courts to give the Guidelines any sort of substantive deference," *id.* at 35, or that the *Gall* explanation requirement places a "legal constraint on the reasoning that the sentencing court may adopt," *id.* at 37. Nor does Peugh deny that the district court has ultimate discretion to sentence anywhere within the statutory range, *Cunningham v. California*, 549 U.S. 270, 292 (2007), and to deviate from the Guidelines range for any policy or fact-specific reason, *Kimbrough v. United States*, 552 U.S. 85, 91 (2007).

The argument is simply this: An amendment to the Sentencing Guidelines that increases the applicable Guidelines range, to use the Government's phrasing (U.S. Br. 19), alters the legal framework within which the district court exercises sentencing discretion. It violates the Ex Post Facto Clause when the amended Guideline "in its operation, create[s] a significant risk of increased punishment for [the defendant]." *Garner*, 529 U.S. at 257. The constitutional inquiry is the significance of the risk of increased punishment, not whether the retroactive amendment displaces the sentencing court's discretion.

2. In this respect, the Government's reliance on *Miller v. Florida* is misplaced. The Government is correct that the advisory Guidelines "do not limit the discretion of sentencing courts in the manner that the presumptive sentencing ranges at issue in *Miller* did." U.S. Br. 23. But again it is the risk of increased

punishment, not the deprivation of discretion, that determines whether a retroactive law violates the Ex Post Facto Clause. In *Miller*, this Court—applying the now discarded operate-to-the-defendant's-disadvantage test, *see* 482 U.S. at 431-33[5]—found that amended presumptive state guidelines "directly and adversely affect[ed] the sentence petitioner receive[d]." *Id.* at 435. Even though *Miller* did not apply the significant-risk test, there is no doubt that the application of more punitive presumptive guidelines would violate the Ex Post Facto Clause under that test. Pet'r Br. 37. But *Miller* does not foreclose that the advisory Guidelines may as well.

The Government makes much of the fact that the respondent in *Miller*, the State of Florida, unsuccessfully analogized its presumptive sentencing guidelines to the U.S. Parole Guidelines, which had withstood *ex post facto* challenges in the courts of appeals on various grounds. U.S. Br. 22-23. But this Court in *Miller* never passed on the constitutionality of any U.S. Parole Guidelines amendment, nor endorsed the reasoning of any of those cases (which, like *Miller* itself, would have been decided under a now-discarded standard). The Court merely "f[ou]nd the federal parole guidelines cases inapposite" because "[n]one of the reasons given in the federal parole cases even arguably applies here." *Miller*, 482 U.S. at 434-35.

There is thus no reason to accept the Government's invitation to assess the

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[5] The Government appears to resurrect the test abandoned by this Court. *See* U.S. Br. 18-19; *Morales*, 514 U.S. at 506 n.3.

constitutionality of amendments to the now-defunct federal parole guidelines or to compare them to the advisory Sentencing Guidelines. Regardless, those guidelines are not on all fours with the post-*Booker* Guidelines system, which requires mandatory benchmarking; requires explanation justifying variances from Guidelines (and their degree); requires appellate review for substantive reasonableness; and authorizes a presumption of reasonableness on review of within-Guidelines sentences.[6] Indeed, many factors may mitigate the

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[6] For example, of the courts of appeals who addressed the issue of reviewability of parole decisions, the majority took the position that substantive federal parole decisions granting or denying parole are unreviewable, even under an abuse of discretion standard. *See Jones v. U.S. Bureau of Prisons*, 903 F.2d 1178, 1183 (8th Cir. 1990); *Wallace v. Christensen*, 802 F.2d 1539, 1545 (9th Cir. 1986) (en banc); *Farkas v. United States*, 744 F.2d 37, 38-39 (6th Cir. 1984); *Garafola v. Wilkinson*, 721 F.2d 420, 423-24 (3d Cir. 1983); *Garcia v. Neagle*, 660 F.2d 983, 988 (4th Cir. 1981). These circuits limited substantive review to whether the Parole Commission "has acted outside its statutory limits," including "that the Commission exceeded the scope of its discretion, violated the Constitution, or reached decisions so arbitrary and capricious as to amount to a violation of due process." *See, e.g., Jones*, 903 F.2d at 1183-84. The few circuits that did review substantive parole decisions have stated that their review is limited and deferential. *See, e.g., Boling v. Mundt*, 261 F. App'x 133, 137 (10th Cir. 2008) (review only for whether there is a "rational basis" for a parole decision); *Moreno-Morales v. United States Parole Comm'n*, No. 96-2358, 1998 WL 124718, at *3 (1st Cir. Jan. 20, 1998) (per curiam) (review whether a decision is "irrational, arbitrary or capricious"); *Simpson v. Ortiz*, 995 F.2d 606, 608 (5th Cir. 1993) (review with "extreme

risk of increased punishment in the parole context that are not present in the sentencing context. The task at hand is not to compare the parole and sentencing guidelines, but to determine whether retroactive application of harsher advisory Guidelines creates a significant risk of increased punishment. *Garner*, 529 U.S. at 255, 257; *Lynce*, 519 U.S. at 443 n.14.[7] On this point, the Government has no substantial answer.

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deference"); *Hanahan v. Luther*, 693 F.2d 629, 632 (7th Cir. 1982) (review for a "rational basis"). Even the minority circuits do not recognize a rule parallel to the permissible appellate presumption of reasonableness for within-Guidelines sentences. *See* Pet'r Br. 25-26.

[7] It is not Peugh's approach, but the Government's proposed categorical exemption from the Ex Post Facto Clause of all discretionary sentencing systems, that is inconsistent with the purposes of the Ex Post Facto Clause. In committing his offense in 1999-2000, when the mandatory Guidelines were in effect and the applicable guidelines range was 36-47 months, Peugh had no actual or constructive notice that he could be sentenced to 70-87 months' imprisonment (and would likely receive a sentence within that range). Moreover, the Ex Post Facto Clause also serves the purpose of preventing potential arbitrariness, vindictiveness, or unfairness when the lawmaking body does not abide by the rules that exist at the time of offense. Pet'r Br. 18–19. Here, the Sentencing Commission made the legislative choice after Peugh's crime to increase offense levels significantly in fraud cases where the loss is substantial. Pet. App. 64a-67a. Peugh cannot be punished more severely for shifts in legislative policy occurring after his offense.

III. Retroactive Application Of Harsher Guidelines Creates A Significant Risk That Peugh Will Receive Increased Punishment.

The Government attacks another straw man in claiming that Peugh's significant-risk analysis entails "a subjective inquiry into the susceptibility of judges to influence from advice." U.S. Br. 12. To the contrary, Peugh relies "entirely on objective considerations" in assessing the significance of risk of increased punishment. *See Lynce*, 519 U.S. at 443 (discussing *Morales*). In the context of the sentencing system as a whole, a defendant may demonstrate such risk by showing that (1) the amendment by "its own terms show[s] a significant risk" or (2) that the amendment, as applied to the defendant's sentence, in practical operation demonstrates such a risk. *Garner*, 529 U.S. at 252, 255.

A Guidelines amendment that raises the Guidelines sentencing range inherently creates a significant risk of increased punishment, in the context of the advisory Guidelines system as a whole. That risk inheres in the structural characteristics of the Guidelines framework in which the district court exercises sentencing discretion: namely, that the district court must consider the Guidelines range as a benchmark at the beginning and throughout the process, and "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 532 U.S. at 50.[8] Moreover, the

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[8] In regard to this requirement, the Government accuses Peugh of overreading *Gall* and "reintroducing" a

sentence and justifications must be able to withstand appellate review for substantive reasonableness, and may be protected by a presumption of reasonableness only if within the Guidelines range. *Id.* at 51.

Thus, even though the district court renders an individualized sentence and is free to deviate from the Guidelines range, it is not surprising that "*[i]n the usual sentencing, ... the judge will* use the Guidelines range as the starting point in the analysis and *impose a sentence within the range.*" *Freeman*, 131 S. Ct. at 2692 (plurality) (emphasis added). Indeed, it was common ground among the majority and the dissenters in *Rita* that appellate review for substantive reasonableness may tend to promote sentences within the Guidelines range. *Rita*, 552 U.S. at 354; Pet'r Br. 26 n.8. In a system where the Guidelines form the basis and benchmark for sentencing, and structural features of the system promote within-Guidelines sentences, amendments that raise the Guidelines sentencing range inherently create a significant risk that a defendant will receive a harsher sentence than if sentenced under the more lenient Guidelines applicable at the time of his offense.

Even aside from that inherent risk, the practical implementation of the rule demonstrates "that as applied to his own sentence the law created a

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proportionality approach rejected earlier in that opinion. U.S. Br. 36-37. But the requirements that the Court had earlier rejected—which limited variances either to "extraordinary circumstances" or those justified by "the use of a rigid mathematical formula," *Gall*, 552 U.S. at 47—were quite different. Peugh has merely quoted this Court's language on the *Gall* justification requirement.

significant risk of increasing his punishment." *Garner*, 529 U.S. at 255. A defendant is not bound to show direct effect upon his own punishment, and may generally rely on the evidence of effect on the class of offenders affected by the rule. *Id.* at 255; *id.* at 260 n.1 (Souter, J., dissenting) (discussing cases); *Weaver v. Graham*, 450 U.S. 24, 33 (1981). But here Peugh has direct and definitive evidence that he suffered greater punishment from retroactive application of the 2009 Guidelines.[9]

As the Government concedes, the 1998 Guidelines in effect at the time of Peugh's offense prescribed a range of 37-46 months. Pet'r Br. 10; U.S. Br. 5. The 2009 Guidelines ratcheted up the Guidelines range to 70-87 months. Pet'r Br. 10-11; U.S. Br. 5. The district court expressly deferred to the harsher 2009 Guidelines in sentencing Peugh. Expressing a disinclination to substitute its own penal philosophy for the Commission's, and agreeing "with the policy of imposing a stricter punishment on defendants that cause significant amounts of loss," the district court resolved to "*give the amount of loss calculations and the resulting advisory guidelines range the appropriate amount of deference in this case.*" J.A. 94-96 (emphasis added). The court proceeded to impose a 70-month sentence at the bottom of the 2009 Guidelines range upon Peugh. It defies belief to suppose that the district court would have granted a

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[9] *Cf. Lynce*, 519 U.S. at 446-47 ("In this case, unlike in *Morales*, the actual course of events makes it unnecessary to speculate about what might have happened. The 1992 statute has unquestionably disadvantaged petitioner because it resulted in his rearrest and prolonged his imprisonment.").

more than 50% upward departure to impose the same prison term if the 1998 Guidelines were operative. The 1998 Guidelines embodied the same policy as the 2009 Guidelines of imposing greater sentences for greater losses; they differed only in the severity of the Guidelines offense levels. Pet'r Br. 40-41. Peugh has shown at a minimum a significant risk that retroactive application of the 2009 Guidelines increased his punishment.[10]

In addition, "[t]he general operation of the [Guidelines system] may produce relevant evidence and inform further analysis on the point." *Garner*, 529 U.S. at 255. Peugh and its amicus marshaled ample evidence of significant risk based on the practical operation of sentencing under the advisory Guidelines generally and in Illinois, as to all offenses and fraud in particular. Pet'r Br. 27-30; Ill. Ass'n of Criminal Defense Lawyers Amicus Br. 8-12. Even though "[d]uring the *Gall* period 80.7 percent of sentences were either within range or below range pursuant to a government motion," USSC *Booker* Report at 60, the Government remarkably asserts that the Guidelines have no causal effect, as if the courts would impose the same sentences in their absence. U.S. Br. 39. Moreover, assessing sentencing statistics does not disregard the individualized nature of sentencing, any more than examining parole-hearing statistics in *Morales* and

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[10] The Government points out that the district court considered a variety of factors and found that the nature of Peugh's conduct did not warrant a downward departure. *See* J.A. 88-93; U.S. Br. 5-8. But that does not alter the fact that the district court expressly deferred to the 2009 Guidelines range in sentencing Peugh.

Garner disregards the individualized nature of parole determinations. *See* U.S. Br. 45. A defendant need only prove a significant risk, not a mathematical certainty, that he will receive a greater sentence as a result of the amended law. Finally, the Government speculates that in the future courts may cease to impose sentences within the Guidelines ranges. U.S. Br. 50. But Peugh does not seek a rule for all time and all persons; he simply shows that, as applied to his sentence, applying harsher Guidelines significantly increased his risk of punishment. *Garner*, 529 U.S. at 255.[11]

Indeed, a recent Sentencing Commission publication confirms the significant risk posed by retroactive application of harsher Guidelines. The USSC *Booker* Report states that "[t]he sentencing guidelines have remained the essential starting point in all federal sentences and have continued to exert

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[11] Ignoring that significant risk is assessed as applied to the defendant's sentence, the Government advances irrelevant evidence of a few different offense types and jurisdictions where the proportions of within-Guidelines sentences are below the norm. U.S. Br. 49-50. This Court need not decide what threshold constitutes significant risk for all cases, but should note that application of a harsher Guidelines may produce a significant risk of increased punishment even where the ultimate sentence is below the Guidelines range (particularly in the common circumstance where the court grants a Government-sponsored departure from the Guidelines). *See* USSC *Booker* Report at 60. Moreover, any retroactive increase in the quantum of punishment would violate the Ex Post Facto Clause. *Cf. Glover v. United States*, 531 U.S. 198, 203 (2001) ("any amount of actual jail time has Sixth Amendment significance").

significant influence on federal sentencing trends over time." USSC *Booker* Report at 3. The Report noted that, post-*Rita*, average sentences have continued to parallel Guidelines minimums. *Id.* at 60. The Commission concludes from its study of the data that "when the average minimum of the applicable guideline range has increased (*due to guideline amendments, increases in offense seriousness, or increases in the criminal history of the offenders*) the average sentence also has tended to increase, as evidenced by the close tracking." *Id.* (emphasis added). In the post-*Booker* period, average sentences for fraud offenses have increased as Guidelines minimums have increased, although not as rapidly. *Id.* at 67 (chart). Indeed, the average fraud sentence nearly doubled between 1998 and 2009 as Guideline minimums escalated. *Id.*

The advisory Guidelines after *Booker* shifted from a mandatory-range to a mandatory-benchmarking system, with other structural characteristics that fostered discretionary within-Guidelines sentencing. Because the Ex Post Facto Clause turns on the effect of a retroactive law on punishment, and the effect under both advisory and mandatory Guidelines is that sentences increase when Guidelines minimums are increased, the result should be the same here as in *Miller*. The retroactive application of the harsher 2009 Guidelines in Peugh's sentencing violated the Ex Post Facto Clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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Supreme Court of the United States

MARVIN PEUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE ILLINOIS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER MARVIN PEUGH

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INTEREST OF THE *AMICUS CURIAE*

The Illinois Association of Criminal Defense Lawyers ("IACDL") is a not-for-profit organization dedicated to defending the rights of all persons as guaranteed by the U.S. Constitution. Its membership consists of private criminal defense lawyers, public defenders, investigators, and law professors throughout the State of Illinois. The mission of the IACDL is to preserve the adversary system of justice; to maintain and foster independent and able criminal defense lawyers; and to ensure due process for persons accused of crimes.

The members of IACDL, an organization that consistently advocates for the fair and efficient administration of criminal justice, have a keen interest in assuring that their clients do not receive sentences that are greater because of the defendant's geographical location or the date of sentencing, and that they are sentenced in compliance with the Ex Post Facto Clause.[1]

SUMMARY OF ARGUMENT

This case presents this Court with an opportunity to clarify—in agreement with all circuit courts but one—that district courts should rely on the version of the U.S. Sentencing Guidelines in effect at the time of the offense if the version in effect at the time of sentencing would

1. No counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. The parties have consented to filing of this brief and such consents are being submitted herewith.

result in a higher Guidelines range. The Seventh Circuit has erroneously held that calculating the Guidelines range based on a later, more severe version of the Guidelines does not violate the Ex Post Facto Clause of the U.S. Constitution because the Guidelines are advisory.

The Seventh Circuit's holding ignores two critical points. First, the Seventh Circuit ignores that the Guidelines retain a mandatory character insofar as the Guidelines range must be calculated correctly, even though the final Guidelines range is not binding, so district courts continue to give the Guidelines great weight. Second, the Guidelines range has a demonstrable gravitational pull on sentences imposed, which means the current circuit split creates a real risk of unwarranted sentencing disparities solely because of their geography.

To resolve the different treatment received by defendants based on geography, the Court should adopt the reasoning of all of the other Circuit Courts. The Court should not adopt the reasoning of the Seventh Circuit. Adopting the reasoning of the Seventh Circuit would simply replace one category of unwarranted sentencing disparities with another. Following the Seventh Circuit's reasoning would mean defendants are at risk of higher sentences if, for reasons out of the defendants' control, their sentencing hearings take place at a later date than hearings for similar defendants.

Amicus, as the representative of criminal defense lawyers whose clients are uniquely affected by the Seventh Circuit's singular view on this issue, urge this Court to reject the Seventh Circuit's reasoning in *Demaree* and instead adopt the reasoning of all other circuit courts who have addressed this issue.

ARGUMENT

I. There Is a "Significant Risk" of an Increased Sentence for Defendants Like Mr. Peugh Because the Guidelines Range Is the Mandatory Starting Point for All Sentences Imposed.

A. District courts must correctly calculate the Guidelines range and use it as the starting point and initial benchmark.

A district court is not free to ignore the U.S. Sentencing Guidelines. The Court's direction to district courts is unambiguous—the Guidelines must be considered first. "As a matter of administration and to secure nationwide consistency, the Guidelines should be **the starting point and the initial benchmark**." *Gall v. United States*, 552 U.S. 38, 49 (2007) (emphasis added); *see also Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) ("The Guidelines provide a framework or starting point—a basis, in the commonsense meaning of the term—for the judge's exercise of discretion.").

Consideration of the Guidelines range is so important that failure to correctly calculate it is reversible error. *See Gall*, 552 U.S. at 51 (holding that in reviewing a sentence, the appellate court "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range"). District courts must also justify any deviation from the sentencing range recommended by the Guidelines:

> A district judge **must give** serious consideration to the extent of any departure from the

> Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.

Id. at 46 (emphasis added). This Court has instructed district courts that they "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance," *id.* at 50, and that courts of appeals "will, of course, take into account ... the extent of any variance from the Guidelines range," *id.* at 51.

This Court has recognized that not every guideline is the product of "careful study," *id.* at 46 n.2, *Kimbrough v. United States*, 552 U.S. 85, 96 (2007), but even when a guideline is unsound, it still "must [be] treat[ed] . . . as the 'starting point and the initial benchmark.'"[2] 552 U.S. at 108 (quoting *Gall*, 552 U.S. at 49). Moreover, once a court correctly calculates the Guidelines range and sentences the defendant within that range, the sentence may be presumed reasonable. *Rita v. United States*, 551 U.S. 338, 351 (2007). The Seventh

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2. Indeed, the amendments that raised the guideline range in Peugh's case from 37-46 months to 70-87 months have been criticized as unsound. *See, e.g.*, Frank O. Bowman, III, *Pour Encourager Les Autres?*, 1 Ohio State J. Crim. L. 373, 404, 411-34 (2004); Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After* Booker, 20 FED. SENT'G REP. 167, 169-70 (2008); Alan Ellis, John R. Steer, Mark Allenbaugh, *At a "Loss" for Justice: Federal Sentencing for Economic Offenses*, 25 Crim. Just. 34, 37 (2011); *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008); *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006).

Circuit has adopted this presumption of reasonableness. *See United States v. Vizcarra*, 668 F.3d 516, 527 (7th Cir. 2012) ("A sentence within a properly calculated guidelines range is presumed to be reasonable; it is the defendant's burden to overcome the appellate presumption."); *United States v. Jackson*, 547 F.3d 786, 792 (7th Cir. 2008).

Therefore, even though district courts have the authority to vary from the Guidelines range, district courts **must begin** with the Guidelines, and the Guidelines range in fact exerts a gravitational pull. These circumstances "create a significant risk of increasing [the defendant's] punishment" and thereby violates the Ex Post Facto Clause when the Guidelines in effect at the time of sentencing call for a harsher punishment than the Guidelines in effect at the time of the crime. *Garner v. Jones*, 529 U.S. 244, 255 (2000).

Because of this practical reality, the majority of circuits have concluded that defendants must have the opportunity to show on an as-applied basis that use of the newer version of the Guidelines creates a "substantial risk" of a harsher sentence. *See United States v. Turner*, 548 F.3d 1094, 1099-100 (D.C. Cir. 2008); *United States v. Ortiz*, 621 F.3d 82, 85-88 (2d Cir. 2010); *United States v. Lewis*, 606 F.3d 193, 198-203 (4th Cir. 2010); *United States v. Lanham*, 617 F.3d 873, 889-90 (6th Cir. 2010); *United States v. Wetherald*, 636 F.3d 1315, 1320-22 (11th Cir. 2011).

Only the Seventh Circuit precludes district courts from any Ex Post Facto Clause analysis in cases like Mr. Peugh's. *See United States v. Peugh*, 675 F.3d 736, 741 (7th Cir. 2012) ("We, however, stand by *Demaree*'s reasoning—the advisory

nature of the guidelines vitiates any ex post facto problem—and again decline the invitation to overrule it.") (citing *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006)). Ignoring the fact that calculation and consideration of the Guidelines is required, the Seventh Circuit alone has held that the Guidelines are no longer subject to the Ex Post Facto Clause. *Id.* In so doing, the Seventh Circuit acknowledged yet declined to follow this Court's standard for determining an Ex Post Facto Clause violation—*Garner*'s "significant risk" standard—in order to reach its unconstitutional conclusion. *Demaree*, 459 F.3d at 794 (stating that the Supreme Court's test for determining Ex Post Facto Clause violations "interpreted literally, would encompass a change in even voluntary sentencing guidelines" but declining to so interpret the law).

In addition, much of the rationale set forth in *Demaree* is no longer consistent with the law and fails to consider the current role of the Guidelines in sentencing. For example, according to *Demaree*, sentencing courts do not have to explain its reasons for rejecting the Guidelines range. *See id.* at 794-95. However, after *Demaree*, this Court held to the contrary in *Rita* and *Gall*. *See Rita*, 551 U.S. at 50; *Gall*, 552 U.S. at 50; *see also* Brief of Marvin Peugh, Petitioner, *United States v. Peugh*, No. 12-62, at 33-34 (Sup. Ct. Dec. 26, 2012).

B. In practice, district courts sentence within the Guidelines range most of the time and use the Guidelines as an anchor when varying from it.

Following this Court's instruction, district courts begin the sentencing process by calculating the Guidelines range. The Guidelines have a strong gravitational pull

because they are the only 18 U.S.C. § 3553(a) factor with a numerical value. This number provides a safe harbor for the sentencing judge. A sentence within or near the Guidelines range generally avoids reversal on appeal, as it is cloaked in the presumption of reasonableness.

The Guidelines range also has an anchoring effect on sentences. It "serves as a psychological 'anchor', which appears to simplify or obviate the daunting task of evaluating the seriousness of the offense, the dangerousness of the offender, and other considerations relevant to the statutory purposes." Paul J. Hofer, *Beyond the "Heartland": Sentencing Under the Advisory Federal Guidelines*, 49 Duq. L. Rev. 675, 689 (2011). As the Honorable Nancy Gertner has explained,

> Anchoring is a strategy used to simplify complex tasks, in which numeric judgments are assimilated to a previously considered standard. When asked to make a judgment, decision-makers take an initial starting value (*i.e.*, the anchor) and then adjust it up or down. Studies underscore the significance of that initial anchor; judgments tend to be strongly biased in its direction.

Hon. Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 Yale L.J. Pocket Part 127 (2006), http://yalelawjournal.org/the-yale-law-journal-pocket-part/criminal-law-and-sentencing/what-yogi-berra-teaches-about-post%11booker-sentencing/ (quotation marks omitted). "Whether [judges] like that number or not, even if they are angry about that number, does not matter; they will still be influenced by that number. That

is the psychological fact." Panel Discussion, *Federal Sentencing Under "Advisory" Guidelines: Observations by District Judges*, 75 Fordham L. Rev. 1, 17-18 (2006) (remarks of Judge Gerald Lynch). As Judge Posner conceded in *Demaree*, "[m]ost federal sentences . . . continue after *Booker* to be within the guidelines' sentencing ranges." 459 F.3d at 794.

Academic research and sentencing statistics bear out these observations from the bench. One scholar recently noted that:

> [A]n empirical analysis of the Sentencing Guidelines' practical effects on sentencing in actual cases [ ] demonstrates . . . that **the Guidelines continue to be applied as the default benchmark for sentencing in all federal criminal cases**. . . . [A] review of post-*Booker* sentencing statistics and reversal rates throughout the federal court system presents a clear picture of the central role that the Sentencing Guidelines continue to play as the de facto arbiter of "reasonableness."

James R. Dillon, *Doubting* Demaree*: The Application of Ex Post Facto Principles to the United States Sentencing Guidelines After* United States v. Booker, 110 W. Va. L. Rev. 1033, 1089 (2008) (emphasis added).

In 2011, more than half of sentences (54.5%) in federal cases were within the Guidelines. Only 17.4% were below the Guidelines range without a government motion, and 1.8% were above the Guidelines range. *See* U.S. Sent'g Comm'n, *2011 Sourcebook of Federal*

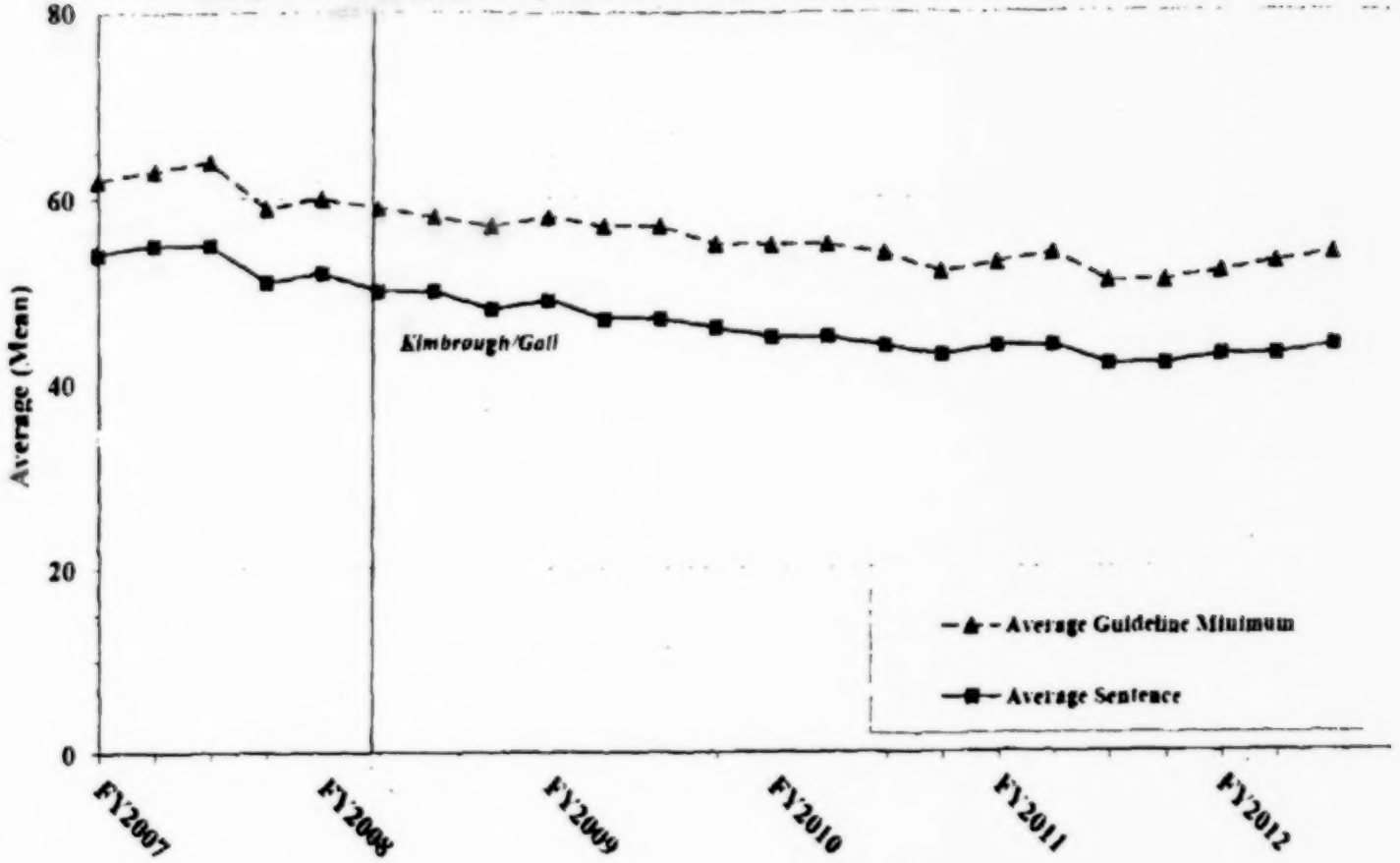
Sentencing Statistics, National Comparison of Sentence Imposed and Position Relative to the Guideline Range, tbl. N, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/TableN.pdf.

Not only do judges sentence within the Guidelines range most of the time, but departures and variances from the range mimic pre-*Booker* departures—the median decrease is still about twelve months. *See* Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. Penn. L. Rev. 1631, 1677 & n.252 (2012) (analyzing Commission data on extent of non-government sponsored departures and variances from 2003 through 2012). Thus, the advisory Guidelines have influence. As Chief Judge McKee of the Third Circuit recently testified, "[t]he average sentence length has closely tracked the guideline minimum for a long period of time." Theodore McKee, Chief U.S. Circuit Judge, U.S. Court of Appeals for the Third Circuit, Statement Before the U.S. Sentencing Commission 19 (Feb. 16, 2012), http://www.ussc.gov/Legislative_and_Public_ Affairs/Public_Hearings_and_ Meetings/20120215-16/Testimony_16_McKee.pdf. Indeed, as illustrated below, the average sentence imposed since 2007 has been approximately ten months below the average Guidelines minimum. The Guidelines anchor sentencing decisions even when the ultimate sentence departs from the Guidelines.

Figure C

AVERAGE SENTENCE LENGTH AND AVERAGE GUIDELINE MINIMUM
QUARTERLY DATA FOR ALL CASES[1]

Fiscal Years 2007 - 2011,
3rd Quarter 2012 Preliminary Cumulative Data (October 1, 2011, through June 30, 2012)



U.S. Sent'g Comm'n, *U.S. Sentencing Commission Preliminary Quarterly Data Report*, 3d Quarter Release (2012), Fig. C, available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2012_3rd_Quarter_Report.pdf (based on "U.S. Sentencing Commission, 2007-2011 Datafiles, USSCFY07-USSCFY11, and Preliminary Data from USSCFY12 (October 1, 2011, through June 30, 2012)").[3]

Therefore, according to the statistics and attested judicial practice, Illinois defendants face much more than "a significant risk" of increased punishment when the Guidelines range in effect at sentencing has increased the recommended punishment above the range in place at the time of the offense. *Garner*, 529 U.S. at 255. Because district courts sentence within the Guidelines range more than half the time and vary from the range only moderately, Illinois defendants caught in the *Demaree* bind are more than likely to receive an increased punishment. And if the *Demaree* reasoning is adopted by this Court, this "significant risk" would be extended to all defendants with a Guidelines range in effect at sentencing

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3. The U.S. Sentencing Commission notes that for this chart, "[c]ases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this table includes time of confinement as described in USSG § 5C1.1. Guideline minimums account for applicable statutory mandatory penalties. Descriptions of variables used in this figure are provided in Appendix A." *Id.*

that has increased the recommended punishment above the range in place at the time of the offense. The Ex Post Facto Clause does not permit this result.

II. The Current Seventh Circuit Approach to Sentencing Should Be Rejected in Order to Prevent Unwarranted Sentencing Disparities.

A. One purpose of the Guidelines is to avoid unwarranted disparity in sentencing.

When this Court severed and excised those provisions of the Sentencing Reform Act that made the Guidelines mandatory to remedy the Sixth Amendment problem, it noted that the advisory Guidelines system would "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *United States v. Booker*, 543 U.S. 220, 264-65 (2005). This Court has held that district courts must "consider the need to avoid **unwarranted disparities**—along with other § 3553(a) factors—when imposing sentences," and in doing so, must "take account of sentencing practices in other courts and . . . these disparities must be weighed against the other § 3553(a) factors and any unwarranted disparity created by [the Guidelines range] itself." *Kimbrough*, 552 U.S. at 108 (emphasis added).

Thus, while lockstep uniformity in sentences among individual defendants or among districts is no longer the goal of the sentencing system, avoiding **unwarranted** disparities remains an important goal even post-*Booker*. As the Sentencing Commission has described it,

"[u]nwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing." U.S. Sent'g Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 113 (2004) (emphases in original). When a sentencing disparity is not relevant to or justified by differences among the circumstances of the offense, the characteristics of the defendant, or the purposes of sentencing, the disparity is unwarranted.

B. *Demaree* causes unwarranted harsher sentences for federal defendants in the Seventh Circuit.

Persons sentenced in the Seventh Circuit are sentenced differently on the basis of their geographical location alone—a disparity irrelevant to the circumstances of the offense, the characteristics of the person sentenced, or the purposes of sentencing. In *Demaree*, the Seventh Circuit held that the Ex Post Facto Clause applies "only to laws and regulations that bind rather than advise" and therefore that the clause does not apply to the Guidelines now that they are advisory. 459 F.3d at 795. So the Seventh Circuit, unlike other circuits, permits district courts to calculate the Guidelines range based on a more severe version of the Guidelines than was in effect at the time of the offense. The district courts within the Seventh Circuit then use that higher range as the still-required starting point and initial benchmark. This practice creates a geographic disparity in the applicable Guidelines range itself. *Kimbrough*, 552 U.S. at 108.

Demaree's impact is not isolated. A review of electronically published case law shows that district courts have cited *Demaree* more than 60 times since 2006. And the effect of *Demaree* is likely broader. Nearly 10,000 Illinois defendants were sentenced under the Guidelines between 2006 and 2011. *See* U.S. Sent'g Comm'n, *Interactive Sourcebook, Circuit and District Statistics*, Table 2 (Guideline Offenders in Each Circuit and District), available at http://isb.ussc.gov/. Most of these are not the subject of written opinions that are available in electronic reporters.

The *Demaree* disparity is therefore both real and far-reaching, as illustrated by Mr. Peugh's sentencing. Under the 1998 Guidelines in effect at the time Mr. Peugh committed his crime, his Guidelines range was 37 to 46 months. *See* Pet'r Br. at 3 (Sup. Ct. Dec. 26, 2012). Mr. Peugh was sentenced under the 2009 Guidelines, under which amendments to the fraud guideline subjected him to a range of 70-87 months for the same crime—roughly twice the length of time provided under the 1998 Guidelines. *See id.* There was not only a "substantial risk" but also a substantial reality of a longer sentence because of Mr. Peugh's geography alone.

In short, *Demaree* has created real unwarranted disparity among sentences to the detriment of Illinois defendants and others sentenced within the Seventh Circuit. Therefore, the Court should address this issue in a way that does not create any further unwarranted disparities.

III. Endorsing the Approach of the Majority of Circuit Courts Is Necessary to Prevent Unwarranted Sentencing Disparities Based Solely on the Date of Sentencing.

The Court should not replace the unwarranted disparities based on geography under the current circuit split with unwarranted disparities based on the timing of the sentencing process under a nationwide application of the *Demaree* court's reasoning. Under *Demaree*, a defendant could receive a substantially higher sentence if, for reasons out of the defendant's control, the date of their sentencing hearing is later than sentencing hearings for similar defendants.

In the absence of an Ex Post Facto Clause violation, the district court must consider the version of the Guidelines in effect on the date of the sentencing hearing. *See* 18 U.S.C § 3553(a)(4)(A)(ii); U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b) (2011)). The Sentencing Commission has issued more than 750 amendments to the Guidelines since they took effect in 1987, and routinely amends the Guidelines in a manner that increases Guidelines ranges. *See* U.S. Sent'g Comm'n, 2011 Federal Sentencing Guidelines Manual, App. C, vols. I-III, available at http://www.ussc.gov/Guidelines/2011_Guidelines/index.cfm. Any criminal case that extends into a new year would therefore put the defendant at risk of Guideline amendments that increase sentencing ranges for existing crimes.[4] Although district

4. As an example, in April 2012 the Commission issued an amendment to the insider trading guideline, raising the base offense level for that crime from 8 to 14. *Compare* U.S. Sent'g Comm'n, 2011 Federal Sentencing Guidelines Manual, § 2B1.4, available at http://www.ussc.gov/

courts "must impose sentence[s] without unnecessary delay," *see* Fed. R. Crim. P. 32(b)(1), the precise timing of that sentencing hearing still varies depending on the court, the attorneys involved, the timing of related criminal cases (including where the defendant may be a cooperating witness), or other factors unrelated to the circumstances of the offense, the characteristics of the defendant, or the purposes of sentencing. Defendants could also face the possibility, for example, of having to choose between collecting evidence to present at a sentencing hearing, *see* Fed. R. Crim. P. 32(i)(2), or accepting an earlier hearing date in advance of new Guideline amendments taking effect.

Defendants should not face increased punishment after having to wait longer for sentencing hearings than

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Guidelines/2011_Guidelines/Manual_HTML/2b1_4.htm, *with* U.S. Sent'g Comm'n, Amendments to the Sentencing Guidelines, at 2 (April 30, 2012) (unofficial text), available at http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20120430_RF_Amendments.pdf. Under this amendment, assuming a criminal history category of I and a gain of $5,500, a person sentenced under the insider trading guideline would go from a range of 6-12 months in a zone not requiring a term of imprisonment to a range of 21-27 months in a zone requiring straight imprisonment. *See* U.S. Sent'g Comm'n, 2011 Federal Sentencing Guidelines Manual, § 5C1.1(c), (f); *id.*, ch. 5, pt. A, Sentencing Table, available at http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_HTML/5a_SenTab.htm. Therefore, if the Court adopts the reasoning of *Demaree*, a person convicted of insider trading that took place prior to this amendment but who is sentenced after this amendment takes effect would likely be sentenced to a year or more in prison. Yet persons convicted of the exact same crime at the same time, but sentenced before those amendments took effect, would likely avoid prison altogether.

similar defendants. The Guidelines seek to avoid this type of "unwarranted disparity." *See* U.S. Sent'g Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 113 (2004).

Therefore, applying the Seventh Circuit's reasoning in *Demaree* nationwide would be at odds with both the Guidelines' purposes and one of the core ideas of the Ex Post Facto Clause – preventing the legislature from making punishment "more burdensome" for acts after they are committed. *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925). The Court should not put more defendants at risk of unwarranted sentencing disparities.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to reverse the decision of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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